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IN THE

Supreme Court of the United States

OCTOBER TERM 1970

70-144

No. ~~1672~~

NEWSWEEK, INC.,

Petitioner,

—against—

WAYNE VANDENBURG,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SCHUYLER B. MARSHALL
RICHARD MUNZINGER
Eleventh Floor
El Paso National Bank Building
El Paso, Texas 79901

LEO P. LARKIN, JR.
STANLEY GODOFSKY
STEPHEN FROLING
200 Park Avenue
New York, New York 10017

Attorneys for Petitioner,
Newsweek, Inc.

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this action on April 5, 1971, which affirmed an order of the United States District Court for the Western District of Texas denying Petitioner's motion for summary judgment.

CITATION TO OPINIONS AND ORDERS BELOW

The unreported order and opinion of the District Court denying Petitioner's motion for summary judgment is printed as Appendix B, p. 3a.

The unreported order of the Court of Appeals which granted Petitioner's motion for leave to appeal is printed as Appendix C, p. 8a.

The *per curiam* opinion and judgment of the Court of Appeals which affirmed the order of the District Court and remanded this case for trial, not yet reported, are reprinted as Appendices D and E, respectively, pp. 9a and 15a.

JURISDICTION

The judgment of the Court of Appeals was entered on April 5, 1971. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

In a libel action brought by the track coach of a State University who is both a public official and a public figure, arising out of the publication, in NEWSWEEK, of a cover story of widespread interest and concern entitled "The Angry Black Athlete", the questions presented are:

1. Whether this record contains evidence of "actual malice" which is constitutionally sufficient to justify subjecting Petitioner to the burden and expense of a jury trial?

2. Whether the District Court and the Court of Appeals, in denying Petitioner's motion for summary judgment, applied or sanctioned standards less protective of First and Fourteenth Amendment rights than that prescribed by this Court?

3. Whether the Court of Appeals misconstrued the opinion of this Court in *Curtis Publishing Co.* v. *Butts,* 388

U. S. 130, when it cited and apparently relied on the test there urged by the minority of this Court?

4. Whether the Court of Appeals correctly enunciated and applied the standard of proof required for a denial of a motion for summary judgment under Rules 56(c) and 56(e) of the Federal Rules of Civil Procedure?

5. In a case involving the assertion of First and Fourteenth Amendment freedoms, whether a motion for summary judgment on the issue of "actual malice" on a full record is to be tested by standards less favorable to a defendant than the standard applicable on a motion for a directed verdict at the close of a plaintiff's case?

6. Whether the Court of Appeals, after granting an interlocutory appeal from an order denying Petitioner summary judgment based on a finding that there existed a triable issue with respect to "actual malice", deprived Petitioner of its First and Fourteenth Amendment rights or otherwise abused its discretion when, on a concededly complete record as to "actual malice", it declined to decide whether the evidence would be sufficient to sustain a judgment for Respondent on the issue of "actual malice" at a plenary trial?

CONSTITUTIONAL PROVISIONS, STATUTES AND FEDERAL RULES INVOLVED

Involved herein are Amendment I and Amendment XIV, Section 1, of the United States Constitution; 28 U. S. C. § 1292(b); and Rules 56(c) and 56(e), Federal Rules of Civil Procedure, the texts of which, insofar as here pertinent, are reprinted in Appendix A, p. 1a.

STATEMENT OF THE CASE

Introduction

This is a diversity action for libel instituted by Wayne Vandenburg ("Respondent") against Newsweek, Inc. ("Petitioner") in the District Court for the Western District of Texas, wherein Respondent claims damages of $2,500,000. The action arises out of the publication, in NEWSWEEK magazine, of a lengthy "cover" article, "The Angry Black Athlete",* which portrayed the growing militancy of black athletes throughout the nation. Respondent is the head track coach at the University of Texas at El Paso, and is therefore both a public official and a public figure.

Following exhaustive pre-trial discovery by both parties on the issue of "actual malice", Petitioner moved for summary judgment because there was no evidence of "actual malice" constitutionally sufficient to permit the case to go to a jury.

The District Court held that the doctrine of *New York Times Co.* v. *Sullivan*, 376 U. S. 254 ("the *Times* doctrine") applied to this case, but denied Petitioner's motion on the ground that the evidence was legally sufficient to permit the issue of "actual malice" to go to a jury. On its own initiative, however, the District Court certified an interlocutory appeal requesting the Fifth Circuit to pass upon the constitutional sufficiency of Respondent's evidence of "actual malice".

The Fifth Circuit granted leave to appeal, but failed to pass upon the fundamental question therein presented. Misapprehending its duties under Rule 56 and apparently relying on a misconstruction of this Court's opinion in

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*The story, some nine pages in length, is reprinted in full, with photographs, as Appendix G, p. 76a *et seq.*

Curtis Publishing Co. v. *Butts,* 388 U. S. 130, the Fifth Circuit refused to decide whether the evidence adduced on the motion for summary judgment was constitutionally sufficient to permit the case to go to a jury. Significantly, the Fifth Circuit concluded its opinion with the following singular observation:

> "We caution against attempting to glean from this decision any whisper of what the outcome should be on a motion for a directed verdict, on the final verdict, or on a motion for judgment n.o.v."

We shall demonstrate that, although the only question presented to the District Court and the Fifth Circuit was the sufficiency of Respondent's evidence of "actual malice", there has not yet been a determination of that question based on a proper constitutional standard and a full review of the record. As a consequence, unless this Court acts now, Petitioner will be unconstitutionally forced to undergo the burdens and expenses of a full trial, not only on the issue of "actual malice", but on all other issues relevant to the merits.

Facts Giving Rise to the Action

"The Angry Black Athlete" related generally to the effect of the so-called Black Power movement on college and university athletics. National in scope, yet detailed and personal in presentation, the article, prepared by NEWSWEEK sports editor Peter Axthelm, was the product of weeks of research, including personal interviews by Axthelm and the assimilation of information from Petitioner's staff, its stringers and others throughout the country.

Respondent's claim is based on but two paragraphs of the NEWSWEEK story:

"It is a mess that extends from Niagara to the University of California, from Michigan State to the University of Texas at El Paso. Sometimes the racial issue is inflamed by a coach's get-tough policy. 'I could give in to a lot of Negro demands,' says one Southwestern track coach, 'and keep my team intact. But someone has to hold the line against these people.'

"At El Paso, track coach Wayne Vandenburg threatened to kick six athletes off the team if they joined the boycott of the New York Athletic Club indoor meet in February. The club was charged with discriminatory membership policies. Vandenburg won and the athletes competed. But two months later, after a talk with Harry Edwards, the same athletes refused to enter a meet at Brigham Young University in Utah because of Mormon doctrines about blacks. Vandenburg promptly dropped champion long-jumper Bob Beamon and five others from the squad."

In February, 1968, Axthelm, then a reporter for SPORTS ILLUSTRATED, covered the New York Athletic Club (NYAC) track meet referred to in the NEWSWEEK story. Because of the NYAC's alleged discriminatory membership policies, a group of Negro leaders organized a boycott of the meet which was honored by approximately two hundred of the Negro athletes invited to participate. The annual NYAC meet had long been regarded as among the most prestigious events in track and field, and the boycott was, therefore, of great public interest and received widespread national publicity.

Of all the Negro athletes invited from throughout the country to compete in the NYAC meet, only nine participated. A matter of much speculation and comment at the time was the fact that, of these nine, six were members of the University of Texas at El Paso (UTEP) track team.

Not a single Negro member of the UTEP team had honored the boycott.

Shortly before the meet, it was rumored that the Negro UTEP players would participate because Respondent had threatened them with loss of their scholarships and removal from the team if they did not. This rumor was given particular credence because one of the militant Black Power leaders stated that the UTEP players were participating under pressure. Axthelm had heard the rumor and sought to determine the facts. He attempted to interview two of the UTEP Negro athletes, but they refused to talk to him. He discussed the rumor with Respondent, who denied that it was true.

As Axthelm has testified,* he initially believed Respondent's denial, even though certain facts raised some doubts in his mind at the outset. In the very interview during which Respondent denied exerting the rumored pressure, for example, the Coach had also said (Axthelm, *Dep.* App. F. pp. 17a-18a):

> "Off the record, we've got to stop these people, somebody has got to stop these people, hold the line against these people . . . someplace."

Nor could Axthelm understand the mysterious and unexplained silence of the athletes themselves or the fact that all Negro UTEP athletes competed in the face of an almost nation-wide black boycott.

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*The testimony of Axthelm and of all other witnesses, insofar as directly related to the issue of "actual malice", is reprinted in Appendix F, p. 17a *et seq.* In view of the Fifth Circuit's comment that the "two-volume, 650-odd page appendix contains extensive discovery, depositions and affidavits from which the district court might properly have concluded that Newsweek had failed to show that there is no genuine issue as to any material fact", Petitioner calls upon Respondent to cite any testimony in the record which controverts the testimony reprinted in Appendix F or otherwise establishes a triable issue in respect of "actual malice".

Despite his doubts and without any comment, Axthelm quoted Respondent's denial in an article he wrote for SPORTS ILLUSTRATED which appeared within days of the February, 1968, NYAC meet.

In April, 1968, a widely reported event served to reinforce Axthelm's nagging doubts as to the veracity of Respondent's original denial. On April 13, 1968, UTEP's track team was scheduled to compete against Brigham Young University in Provo, Utah. Because of the Mormon doctrine with respect to Negroes and the emotions engendered by the assassination of Dr. Martin Luther King, Jr., the UTEP Negro athletes boycotted the meet and were immediately expelled from the team with a consequent loss of their athletic scholarships. Although some of these athletes attempted thereafter to regain their positions and scholarships, not one was ever reinstated.

Respondent admits that, prior to the Brigham Young meet, he advised the Negro members of his team that, if they refused to participate, they would thereby "voluntarily disassociate" themselves from the team; that they ceased to be members of the team as a result of action taken by him immediately after the Brigham Young meet; and that none of the athletes was ever reinstated. Respondent chose to characterize these facts as a "voluntary disassociation" by the athletes involved, but it is beyond doubt that the athletes did not resign; they were permanently removed. Interestingly, this specious distinction, claimed by Respondent to mark the line between truth and falsity, was ultimately and reluctantly abandoned by Respondent's counsel in oral argument before the Fifth Circuit, although insisted upon by Respondent throughout his sworn testimony and in his briefs in both courts below.

Respondent's expulsion of the UTEP Negro athletes was widely reported at the time. The story was carried

by The Associated Press and the *New York Times*. The AP wire service dispatch and the *Times* story both came to Axthelm's personal attention. Additional confirmation came to Axthelm from the following sources:

1. *Anita Verschoth*—a free-lance sports reporter who had originally been employed in 1959 as a TIME magazine correspondent in Germany, and who had for several years contributed articles or accepted assignments from such magazines as SPORTS ILLUSTRATED, NEWSWEEK, and TOPIC. Axthelm had previously employed Miss Verschoth's free-lance services, was personally acquainted with her and regarded her as completely trustworthy and reliable. Miss Verschoth's confirmatory information was based upon a personal interview she had with Respondent at San Diego, California, during which he admitted to her that he had dismissed the UTEP Negro athletes from the team after the Brigham Young meet.

2. *Samuel Skinner*—sports editor for a San Francisco newspaper, the *Sun Reporter*, and sports director for radio station KVIA of that city. Mr. Skinner, who had 12 years experience as a journalist, specialized in reporting "black sports". Skinner was personally acquainted not only with Axthelm, but with several of the Negro UTEP athletes here involved. He, too, was regarded by Axthelm as a professional whose reliability and integrity as a reporter had long been established. Mr. Skinner, independently of Mr. Edwards, confirmed both that Respondent had threatened his Negro athletes in New York and had expelled them following Brigham Young.

3. *Harry Edwards*—a well-known former athlete, who had become a leader of the Black Power movement and who had been instrumental in organizing the NYAC boy-

cott. Edwards held a B.A. degree from San Jose State College, a Master's degree from Cornell University and was then completing his studies for a doctorate in sociology at Cornell University. Edwards had been an associate professor at San Jose State College and had lectured at a number of other colleges and universities throughout the country. He also was quite naturally regarded by Axthelm as a reliable source of information about Negro athletes and the Black Power movement. Edwards, too, confirmed the facts concerning both incidents. Edwards' information was particularly significant to Axthelm because he knew that Edwards had but recently been at the UTEP campus in El Paso. Moreover, Axthelm was also aware that Edwards, like Skinner, was a confidant of the Negro UTEP athletes who had been removed from the team.

The information provided by these sources with respect to both incidents was also confirmed by San Jose State athletes Lee Evans and John Carlos.

Nothing further need be said concerning the Brigham Young incident, since the accuracy of Axthelm's report regarding that incident was finally conceded on oral argument before the Fifth Circuit.

With respect to the NYAC incident, the record discloses: Respondent's statement to Axthelm in February that "... we've got to stop those people ..."; the puzzling participation of six UTEP Negro athletes in the boycotted NYAC meet; the refusal of two of those athletes to be interviewed by Axthelm at the time; Respondent's conduct in actually removing the athletes after they refused to participate at Brigham Young; and information from a number of sources believed by Axthelm to be reliable and in the confidence of the athletes involved. In view of the foregoing, Axthelm surely had ample reason for reaching the conclusion that Respondent had not been candid; that the rumor that Respondent had threatened to remove the

Negro athletes at the time of the NYAC meet was in fact true; and that, as a result of this pressure, those athletes participated in the meet.

Axthelm testified at length as to the sources of his information concerning the matters here at issue. He testified that he regarded his several sources of information as reliable and that he entertained not the slightest doubt, when he wrote the story, that his statements regarding Respondent were true. All of Axthelm's sources have confirmed on deposition that they gave him the information upon which he relied, and that they, too, believed the information to be true. In short, there is not a scintilla of evidence in the voluminous record in this case that Axthelm entertained the slightest doubt, when he wrote his story in June and July, 1968, that Respondent had threatened to do in February that which he concededly did in April.

The Opinions Below

The District Court, however, denied Petitioner's motion on the ground that the record disclosed some evidence of falsity* and that there was "evidence, *though slight,* from which a jury might *infer* that the writer of the article had *suspicions* of the falsity of the statements made by him and that he had before him *contra-indications* as to the correctness of his conclusions (emphasis supplied)," a test far less protective of First Amendment rights than that prescribed by this Court.

The District Court recognized, even under its "contra-indications" standard, that the issue was close, and, on its own initiative, certified the question of the existence of

*This evidence could only have consisted of Respondent's uncorroborated testimony and two insignificant factual errors entirely irrelevant to this case and freely conceded by Petitioner throughout the proceedings.

"actual malice" to the Fifth Circuit for an interlocutory determination. Despite the erroneous standard it had in fact applied, the District Court correctly asked the Fifth Circuit to answer the question, whether or not Respondent, in opposing the motion, had met its burden by proving the existence of a triable issue as to "actual malice" with "the convincing clarity which a constitutional standard demands."

Without ever answering the District Court's question, the Fifth Circuit affirmed and remanded this case for trial. It observed, preliminarily, that its task "differs radically", on an interlocutory appeal, from what it would have been were this an appeal from a final judgment, saying:

> "Here, we do not review a finding of actual malice, but simply an interlocutory order to the effect that Newsweek has failed to show that there is no genuine issue as to any material fact and to show further that it is entitled to judgment as a matter of law. Rule 56(c), Fed. R. Civ. P. The burden of so showing rests on the moving party, Newsweek, and "the inferences to be drawn from the underlying facts contained in [the material presented] must be viewed in the light most favorable to the party opposing the motion." *United States* v. *Diebold, Inc.*, 1962, 369 U. S. 654, 655; *Gauck* v. *Meleski*, 5 Cir. 1965, 346 F. 2d 433, 436.

The Fifth Circuit conceded that on final appeal it would be required to review the evidence to determine whether such evidence could constitutionally support a judgment for Respondent. But because the appeal was interlocutory and also apparently because of the length of the record, or perhaps because the Fifth Circuit misconstrued this Court's opinion in *Butts* (it cited and apparently relied on the test

which had there been urged by a minority of this Court), the Fifth Circuit simply refused to review the sufficiency of the evidence. The Court did make reference to Axthelm's earlier publication of Respondent's version of what happened at the NYAC meet, but it made no mention of the events and information which Axthelm testified had changed his mind. The Fifth Circuit also made passing reference to what it characterized as a "vigorous attack" by Respondent on the reliability of Axthelm's sources, although the record establishes that none of Petitioner's evidence of its good faith or belief in the truth of what it printed was anywhere even contradicted, much less impeached or refuted. Indeed, the so-called "vigorous attack" consisted for the most part of *ad hominem* attacks on the possible bias of Axthelm's sources because, with the exception of Anita Verschoth, all were blacks and sympathetic to the Black Power movement. In short, the Fifth Circuit, although committing errors of its own which we shall hereafter note, affirmed the result reached by the District Court and thus gave appellate sanction to the improper and unconstitutional standard for determining "actual malice" which the District Court had applied.

REASONS FOR GRANTING THE WRIT

I.

In *New York Times* v. *Sullivan* and the cases which have followed it, this Court has repeatedly recognized, in a variety of contexts, that the costs and burdens of a trial, or even the threat of a trial, can substantially inhibit freedom of expression. *Time, Inc.* v. *Pape,* 39 U. S. L. W. 4270, 4274 (U. S. February 24, 1971); *Linn* v. *Plant Guard Workers,* 383 U. S. 53, 64 (1966); *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965); *Baggett* v. *Bullitt,* 377 U. S. 360, 378-79 (1964).

It is for this reason, in cases involving First Amendment freedoms, that our courts have favored the summary disposition of such issues as the applicability of the *Times* doctrine and the existence of "actual malice." *Thompson* v. *Evening Star Newspaper Co.*, 394 F. 2d 774, 776 (D. C. Cir. 1968), *cert. denied*, 393 U. S. 884; *Washington Post Co.* v. *Keogh*, 365 F. 2d 965, 968 (D. C. Cir. 1966), *cert. denied*, 385 U. S. 1011. At one time, the Fifth Circuit itself espoused this principle. *Bon Air Hotel, Inc.* v. *Time, Inc.*, 426 F. 2d 858, 864-65 (5th Cir. 1970); *Time, Inc.* v. *McLaney*, 406 F. 2d 565, 566 (5th Cir. 1969), *cert. denied*, 395 U. S. 922.

But the decision below repudiates this view. In a case in which the *Times* doctrine concededly applies, the Fifth Circuit has refused, in an appeal properly before it, to pass upon the sufficiency of evidence of "actual malice" until after a full-scale trial of all issues, despite the fact that the record relating to "actual malice" is fully developed and the question is ripe for decision. Thus, although the Fifth Circuit granted Petitioner an interlocutory appeal in form, it has denied such appeal in substance. In so doing, the Fifth Circuit has applied a standard of review less liberal than that which this Court and many lower courts, including the Fifth Circuit itself, have previously applied in Rule 56 non-constitutional cases—a standard which, if permitted to stand, will greatly weaken summary procedures as a technique for ameliorating the burdens and expense of trials in cases involving First Amendment freedoms.

The procedural errors are compounded by the fact that neither court below adopted an appropriate standard for determining the existence of evidence of "actual malice" sufficient to permit the case to go to a jury. This error, if uncorrected, will not only dilute the effectiveness of summary proceedings in this type of case, but will sub-

stantially weaken the effectiveness of the *Times* doctrine itself.

Unless this Court acts—and acts now—to correct these errors, Petitioner will be forced to resume heretofore deferred expensive and time-consuming discovery on numerous issues which, though highly relevant to a full-scale defense on the merits, are not directly related to the constitutional issues here presented. Petitioner will be forced to undergo a jury trial, involving possibly weeks of testimony and argument. In all probability, the case will be tried before the very District Judge who has already held —we submit erroneously—that the evidence heretofore adduced is constitutionally sufficient to permit a jury to find "actual malice" and who, therefore (despite the implications of the last sentence of the Fifth Circuit's opinion) can scarcely be expected to grant Petitioner's motion for a directed verdict at trial. Thus, Petitioner will be exposed, not only to the burdens and expenses of trial, but also to the passions of a jury which will be called upon to evaluate the claim of one of its popular and locally prominent public figures against a member of the national news media whose sources are such as will likely incur local antipathy.

II.

Even a cursory analysis of the opinions below establishes beyond doubt that both the District Court and the Fifth Circuit substantially misunderstood, misconstructed, misapplied or failed to apply the appropriate constitutional standard for determining "actual malice":

(a) The District Court squarely held that evidence, however slight, from which a jury might *"infer"* that the publisher had *"suspicions"* of the falsity of its article or had before it *"contra-indications"* as to the correctness of its conclusions would be sufficient to sustain a jury finding of "actual malice."

This test is a far cry, indeed, from the test consistently prescribed by this Court. "Actual malice" requires no less than actual knowledge of falsity or reckless disregard of the truth—evidence that the publisher *in fact* entertained serious doubts as to the truth of the publication complained of. *Time, Inc.* v. *Pape,* 39 U. S. L. W. 4270 (U. S. February 24, 1971); *Greenbelt Pub. Assn.* v. *Bresler,* 398 U. S. 6 (1970); *St. Amant* v. *Thompson,* 390 U. S. 727 (1968).

If a test which makes liability dependent on "suspicions" and "contra-indications" is permitted to stand, the *Times* doctrine will for all practical purposes be emasculated. It is difficult to conceive of a libel suit in which there will not be some "contra-indication" of the correctness of an interpretation drawn by a reporter from an event at which he was not an eye-witness, or, for that matter, an event in which he directly participated. We note that such "contra-indications" have been present in many cases decided by this Court from the inception of the *Times* doctrine to the Court's most recent pronouncement thereon. *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964); *Associated Press* v. *Walker,* 388 U. S. 130 (1967); *Time, Inc.* v. *Pape, supra.*

(b) The Fifth Circuit did not even address itself to the erroneous standard applied by the District Court. It apparently ignored altogether the "actual malice" standard prescribed by this Court, adverting, instead, to the "investigatory standards" test urged by the minority opinion in *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130, 158 (1967), and rejected most recently by this Court in *Greenbelt Pub. Assn.* v. *Bresler,* 398 U. S. 6, 12-13 (1970).

(c) *It is of the greatest significance that neither the District Court nor the Fifth Circuit held that there was sufficient evidence in the record to sustain a finding that*

Petitioner published its article with knowledge of its falsity or with a high degree of awareness of its probable falsity or that Petitioner or Axthelm in fact entertained serious doubts as to the truth of that which was published.

Petitioner submits that it is constitutionally entitled, on this record, to an interlocutory determination of the legal sufficiency of Respondent's evidence, if any, of "actual malice", based upon proper constitutional standards. On any such review of the evidence, Petitioner would surely prevail. No such determination has as yet been made by any Court.

III.

The only evidence relied on by the District Court in denying Petitioner's motion for summary judgment was the fact that Axthelm, months before publication of the NEWSWEEK article, had published without comment a denial by Respondent that he had pressured his Negro teammembers to participate in the NYAC meet in February, 1968, on pain of expulsion. But Axthelm testified specifically, in detail and without contradiction as to the many reasons which ultimately led him to reject Respondent's denial. First, of course, Respondent actually expelled the athletes in April, 1968, when they boycotted another track meet at Brigham Young University, a fact which came to Axthelm's attention from AP and *New York Times* reports. Shortly thereafter, Axthelm obtained a stream of information from a variety of sources on whom he had reason to rely. This information confirmed the earlier rumors, was consistent internally, and was consistent, also, with Respondent's conduct in the aftermath of the boycott at Brigham Young.

The Fifth Circuit ascribed great weight to the fact that Axthelm did not re-interview Respondent or attempt once again to interview the Negro athletes as to the truth of the

rumors concerning Respondent's alleged threats prior to the NYAC meet. But Axthelm's failure to do so is understandable—more so than in most cases: Axthelm had asked Respondent once about the rumors, and Respondent had categorically denied them. Another inquiry would certainly have elicited another denial, as witness Respondent's testimony that the athletes had "voluntarily disassociated" themselves from the team at Brigham Young. In virtually every case in which the *Times* doctrine is invoked, the plaintiff, if asked, would deny the truth of the charges levelled against him. If such a denial were sufficient to force a full trial in the face of a motion for summary judgment, then censorship of the most insidious sort would inevitably result—censorship at the behest of those whose newsworthy activities the media would subject to public scrutiny. A mere self-serving denial would be enough to create a triable issue of fact.

It will also be recalled that Axthelm had in fact attempted to interview two of the UTEP Negro athletes at the time of the NYAC meet in February, 1968, and that they had refused to talk to him. Subsequently, he received confirmatory information from persons whom he not only considered reliable, but whose access to the athletes was obviously better than his own. At the time Axthelm was working on his story, the athletes were still at UTEP, though no longer on the team. They were attempting, though unsuccessfully, to obtain reinstatement. There is nothing in the record to support a suggestion that the athletes would have been more willing to talk to Axthelm in May and June than they were in February, or that they would have told him anything at variance with the confirmatory information he already had received.*

*We note in passing that Respondent has not taken the deposition of a single athlete involved in either of the two incidents here at issue, or offered any testimony by any of them, even in affidavit form, which would controvert the information Axthelm obtained.

Nor should we lose sight of the fact that this litigation arises out of but two small paragraphs in a nine-page story which, of necessity, was based on a wealth of information Axthelm and his staff had gathered from numerous secondary sources throughout the country. Nothing known to Axthelm suggested to him that these two paragraphs should receive more detailed investigation than the rest of his story. Nothing in the record suggests that any such investigation, however extensive, would have given Axthelm any information different from that which he already had when he wrote his story.

The record is utterly devoid of any evidence at all that Axthelm had the slightest doubt, at the time he wrote his article for Petitioner, as to the truth of what his story contained, let alone "a high degree of awareness of its probable falsity." His sources testified under oath that Axthelm accurately published what they told him and that they, his sources, still believed what they told him was true. And although (as noted by the Fifth Circuit) Respondent "vigorously attacked the reliability of these sources" because most of them were Negroes active in or sympathetic to the Black Power movement, nowhere in the record is it even suggested that Axthelm ever entertained any doubt whatsoever as to their reliability. Indeed, by the application of any objective standard, Axthelm was fully justified in relying upon the information then available to him.

At most, even on the theory adopted by the Fifth Circuit, this case involved investigative omissions—omissions not shown to have any significance whatsoever; omissions which are clearly understandable and justified by the circumstances; omissions which, in any event, are insufficient to sustain a finding of "actual malice." *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964); *St. Amant* v. *Thompson,* 390 U. S. 727 (1968).

In the light of the undisputed facts developed in the 650-page record, it was an error of constitutional magnitude for the courts below to order this case to be tried on the merits. Petitioner should by now have obtained summary judgment. Instead, unless this Petition is granted, Petitioner must undergo a trial on all of the issues and perhaps ultimately learn—probably not until it is again before this Court—on what can only be a record virtually identical to the one which has already so painstakingly been made—that the trial court erred in not granting a directed verdict or a judgment n.o.v.

IV.

Even if this case did not involve First Amendment freedoms which go to the core of our democratic society—if it were simply a commercial suit on a promissory note—the decision of the Fifth Circuit would, nevertheless, be worthy of review by this Court.

In holding that a defendant may not obtain summary judgment under Rule 56(e) in circumstances where it might be entitled to a directed verdict on the same record after a full trial, the Fifth Circuit has rendered a decision on an important and recurring question of Federal procedure which is in conflict with a decision of this Court,* and with the applicable decisions of other Courts of Appeal on the same matter.**

An appellate court may not avoid its duty to review the record to determine the sufficiency of the evidence in a case properly before it merely because the case arises out of an interlocutory appeal, rather than an appeal from a final judgment. *See, Lovable Co.* v. *Honeywell, Inc.*, 431 F. 2d

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**First Nat. Bank* v. *Cities Service*, 391 U. S. 253, 288-90 (1968).

***Doff* v. *Brunswick Corporation*, 372 F. 2d 801, 805 (9th Cir. 1967), *cert. denied*, 389 U. S. 820; *Wilcox* v. *Transamerican Freight Lines, Inc.*, 371 F. 2d 403, 405 (6th Cir. 1967), *cert. denied*, 387 U. S. 931; *Chambers* v. *United States*, 357 F. 2d 224, 227 (8th Cir. 1966).

668 (5th Cir. 1970). The basic purpose of an interlocutory appeal is to "materially advance the ultimate termination of the litigation," 28 U. S. C. § 1292(b). In fulfillment of that purpose, and particularly in the constitutional area, the Fifth Circuit was required to review the record before it to determine, in the words of the District Court below, "whether or not the proof offered by the Plaintiff had 'the convincing clarity which a constitutional standard demands' (citation omitted), before long and expensive trial proceedings are incurred."

We respectfully submit that the Fifth Circuit's opinion constitutes such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION

For each of the reasons assigned, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

SCHUYLER B. MARSHALL
RICHARD MUNZINGER
Eleventh Floor
El Paso National Bank Building
El Paso, Texas 79901

LEO J. LARKIN, JR.
STANLEY GODOFSKY
STEPHEN FROLING
200 Park Avenue
New York, New York 10017
Attorneys for Petitioner,
Newsweek, Inc.

IN THE

Supreme Court of the United States

OCTOBER TERM 1970

No.

NEWSWEEK, INC.,

Petitioner,

—against—

WAYNE VANDENBURG,

Respondent.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPENDIX A

Constitutional Provisions Involved

U. S. Constitution, Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U. S. Constitution, Amendment XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statute Involved

28 U. S. C. § 1292 (b)

INTERLOCUTORY DECISIONS

"(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The

Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

Federal Rules Involved

RULE 56

SUMMARY JUDGMENT

(c) *Motion and Proceedings Thereon.* . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .

(e) *Form of Affidavits; Further Testimony; Defense Required.* . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

APPENDIX B

Order and Opinion of the District Court Denying Petitioner's Motion for Summary Judgment

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

CIVIL ACTION No. 68-124-EP

WAYNE VANDENBURG,

VS.

NEWSWEEK, INC.

The Defendant has filed a Motion for Summary Judgment in the above cause, together with a brief in support thereof and a reply brief to the brief filed herein by the Plaintiff and also proposed Findings of Fact and Conclusions of Law.

The Plaintiff has filed a brief in opposition to the Defendant's Motion for Summary Judgment and proposed Findings of Fact and Conclusions of Law.

In connection with the Motion filed and the briefs and proposed Findings of Fact and Conclusions of Law, the Court has considered all pleadings, depositions, interrogatories and answers thereto and admissions filed in this cause.

The procedure to be followed in this case, in the opinion of the Court, falls within the practice set forth by Judge Tuttle in the case of *Time, Inc.* v. *McLaney*, 406 F. 2d. 565. In this case, Judge Tuttle gives a very fine, exhaustive

Appendix B

DISTRICT COURT'S ORDER AND OPINION

treatment of the problems presented to this Court in this case.

There is one question involved in this law suit, to-wit: does the record established by the Plaintiff demonstrate that there is an issue of fact from which a jury could find "actual malice" as defined by the recent Supreme Court decisions. (See Motion for Summary Judgment)

In reviewing the evidence offered by the Plaintiff we are concerned with these questions: Is there any fact or circumstance shown in the evidence which would cause Axthelm to doubt the truth of the statements made by him? Second, by what means did Axthelm obtain the basis for his statements and was he required by the standard set down by the Supreme Court to check the information and if so, the efforts he made to check the information, and third, "Whether it is permissible for this Court to conclude as a matter of law whether there was any fact put in issue on the record in this Court which would require submission to a jury the question of whether the Plaintiff had carried his burden of showing not only the falsity of the statement but if false, that it was motivated by "actual malice" as defined by the recent Supreme Court decisions" (*Time, Inc.* v. *McLaney, Supra.* at page 570, 571.)

Federal Courts in particular are reluctant to deprive a litigant of the opportunity to present his case to a jury.

The law applicable to this case is set forth very clearly by Judge Tuttle in *Time, Inc.* v. *McLaney, Supra.* at page 572 and 573.

"The test . . . . is not keyed to ordinary care; defeasance of the privilege is conditioned, not on mere negligence but on reckless disregard for the truth." "There must be sufficient evidence to permit the conclusion that the Defendant

is [sic] fact entertained serious doubts as to the truth of his publication."

The Court has concluded that there is evidence from which a jury might find that the statements were false and that there is evidence, though slight, from which a jury might infer that the writer of the article had suspicions of the falsity of the statements made by him and that he had before him contra-indications as to the correctness of his conclusions.

The Court has concluded that there is evidence, though slight, that would permit a fact finder to infer that the standard laid down by the Supreme Court had been met by the Plaintiff.

The Court believes that the Appellate Court should pass on the question of whether or not the proof offered by the Plaintiff had "the convincing clarity which a constitutional standard demands." (*New York Times Co.* v. *Sullivan,* 376 U. S. 254 at page 286), before long and expensive trial proceedings are incurred.

The Court believes that this is the purpose of Section 1292 §(b), Title 28 U. S. C. A., which provides "When a district judge in making in a civil action an order not otherwise appealable under this section shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order."

From the evidence submitted and considered by the Court with the Summary Judgment and on file in the case, the Court believes that the facts have been substantially developed and the issues involved in this case may be dis-

posed of from this record, and that in the interest of time and expense to all parties concerned, this record should be submitted to the Appellate Court for determination of the issue set forth above. The principal of law involved is not in dispute and that is, first, can the Plaintiff establish "actual malice" from this evidence, actual malice meaning "that the statement complained of was known by the Defendant to be false at the time it was made or that it was published with reckless disregard of whether it was false or not. *New York Times Co.* vs. *Sullivan, Supra.* Extended to public figures, *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130, and all matters of public interest, importance and concern, *Time, Inc.* v. *McLaney, Supra.* In *St. Amant* v. *Thompson,* 390 U. S. 727, 20 L. Ed. 2d 262, 88 Sup. Ct. 1323 (1968), the Court stated:

> "St. Amant had no personal knowledge of Thompson's activities; he relied solely on Albin's affidavit although the record was silent as to Albin's reputation for veracity; he failed to verify the information with those in the union office who might have known the facts; he gave no consideration to whether or not the statements defamed Thompson and went ahead heedless of the consequences; and he mistakenly believed he had no responsibility for the broadcast because he was merely quoting Albin's words."
>
> "These considerations fall short of proving St. Amant's reckless disregard for the accuracy of his statements about Thompson." (390 U. S. at 730, 731).

Appendix B

DISTRICT COURT'S ORDER AND OPINION

The Court then reviewed the relevant authorities and concluded:

> ". . . reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the Defendant in fact entertained serious doubts as to the truth of his publication."

Defendant contends that the writer relied upon two persons whom he believed to be reliable. The Plaintiff argues to the contrary that the writer had previously published an article on the same subject after investigation which casts no reflection on Plaintiff and cites instances indicating that the writer of the questionable article could not have written it in good faith and that the case falls clearly within the *Goldwater vs. Ginzburg,* 414 F.Supp. 324, and the case of *Curtis Publishing Co.* v. *Butts, Supra.*

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED BY THE COURT that the Motion for Summary Judgment filed by the Defendant herein, be, and hereby is DENIED.

IT IS FURTHER THE OPINION OF THIS COURT, that this Order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of the litigation and requests the Fifth Circuit to hear said appeal should the Defendant request same, as provided by Section 1292 §(b), Title 28 U.S.C.A.

ENTERED THIS 31st day of December, 1969.

(Signed) ERNEST GUINN
UNITED STATES DISTRICT JUDGE.

APPENDIX C

Order of United States Court of Appeals for the Fifth Circuit Granting Petitioner's Motion for Leave to Appeal

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

MISC. No. 1598

NEWSWEEK, INC.,
Petitioner,

versus

WAYNE VANDENBURG,
Respondent.

ON APPLICATION FOR LEAVE TO APPEAL FROM AN INTERLOCUTORY ORDER

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.
BY THE COURT:

IT IS ORDERED that leave to appeal from the interlocutory order of the United States District Court for the Western District of Texas entered on December 31, 1969, in the above styled and numbered cause, is hereby GRANTED.
A true copy

Attest: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit.

(Signed) AUDREY D. GLYNN
Deputy

New Orleans, Louisiana
FEB. 11, 1970

[SEAL]

APPENDIX D

Per Curiam Opinion of the United States Court of Appeals for the Fifth Circuit Affirming the Order of the District Court and Remanding the Case for Trial

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 29451

WAYNE VANDENBURG,
Plaintiff-Appellee,

versus

NEWSWEEK, INC.,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS.

(April 5, 1971)

Before RIVES, AINSWORTH and MORGAN,
Circuit Judges.

PER CURIAM: Newsweek, Inc., the defendant in this libel suit, takes this interlocutory appeal pursuant to 28

Appendix D

FIFTH CIRCUIT'S *PER CURIAM* OPINION

U.S.C.A. § 1292(b) from a judgment of the district court denying its motion for summary judgment. We affirm and remand the case for trial.

The alleged libel resulted from an article, "The Angry Black Athlete," which was published as the cover story for Newsweek's July 15, 1968 issue. The article related generally to the effect of the so-called black power movement on college and university athletics. Vandenburg's claim is based on the following paragraphs:

> "It is a mess that extends from Niagara to the University of California, from Michigan State to the University of Texas at El Paso. Sometimes the racial issue is inflamed by a coach's get-tough policy. 'I could give in to a lot of Negro demands,' says one Southwestern track coach, 'and keep my team intact. But someone has to hold the line against these people.'
>
> "At El Paso, track coach Wayne Vandenburg threatened to kick six athletes off the team if they joined the boycott of the New York Athletic Club indoor meet in February. The Club was charged with discriminatory membership policies. Vandenburg won and the athletes competed. But two months later, after a talk with Harry Edwards, the same athletes refused to enter a meet at Brigham Young University in Utah because of Mormon doctrines about blacks. Vandenburg promptly dropped champion long-jumper Bob Beamon and five others from the squad."

Appendix D

FIFTH CIRCUIT'S *PER CURIAM* OPINION

On this interlocutory appeal our task differs radically from our duty on an appeal from a final judgment.[1] Here, we do not review a finding of actual malice, but simply an interlocutory order to the effect that Newsweek has failed to show that there is no genuine issue as to any material fact and to show further that it is entitled to judgment as a matter of law. Rule 56(c), Fed. R. Civ. P. The burden of so showing rests on the moving party, Newsweek, and "the inferences to be drawn from the underlying facts contained in [the material presented] must be viewed in the light most favorable to the party opposing the motion." *United States* v. *Diebold, Inc.*, 1962, 369 U. S. 654, 655; *Gauck* v. *Meleski*, 5 Cir. 1965, 346 F. 2d 433, 436.

In cases involving First Amendment freedoms, the D. C. Circuit has suggested that summary judgments should be granted not "too restrictively" for the purpose of avoiding "long and expensive litigation productive of nothing and curbing the danger that the threat of such litigation will be used to harass or to coerce a settlement." *Washington Post* v. *Keogh*, D. C. Cir. 1966, 365 F. 2d 965, 968; see also *Thompson* v. *Evening Star Newspaper Co.*, 1968, 394 F. 2d 774. The Second Circuit has distinguished those holdings as "cases in which the non-moving party failed to file

---

[1]If this were on final appeal by defendant, we would have "to review 'the evidence in the . . . record to determine whether it could constitutionally support a judgment' for the plaintiff. *New York Times, supra* [376 U. S. 254], at 284-285; *Beckley Newspaper v. Hanks*, 389 U. S. 81, 83; *St. Amant* v. *Thompson*, 390 U. S. 727; *Greenbelt Pub. Assn. v. Bresler*, 398 U. S. 6, 11." Time, Inc. v. Pape, 1971, U. S. [No. 109, decided February 24, 1971].

affidavits or other papers to refute the moving party's affidavits and to show that a genuine issue of fact existed." *Goldwater* v. *Ginsburg,* 2 Cir. 1969, 414 F. 2d 324, 337, 338, n. 21; *cert. denied* 396 U. S. 1049. Indeed, in *Thompson* v. *Evening Star, supra,* the court said that "Plaintiff, in effect, relied on his pleadings to create an issue of fact." 394 F. 2d at 777. Similarly, in the case upon which the district court relied in suggesting an interlocutory appeal, *Time, Inc.* v. *McLaney,* 1969, 406 F. 2d 565, Judge Tuttle was careful to point out,

> "* * * we note that in this case there is a complete absence of any indication that the writer of the article had any suspicion of the falsity of the statements made by him, and there is a total lack of proof that he had before him any contra-indications as to the correctness of his conclusions."

406 F. 2d at 573.

There is no dispute that Vandenburg is a public figure and that the test for libel is that set out in *New York Times* v. *Sullivan,* 1964, 364 U. S. 254, and *Curtis Publishing Co.* v. *Butts,* 1967, 388 U. S. 130. Newsweek does not dispute that there are facts in evidence from which a jury might find some parts of the article false. Its sole contention is that the record as a whole does not present sufficient evidence to give rise to an issue of fact from which a jury could find "actual malice."

A statement is made with actual malice if made "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times* v. *Sullivan,*

supra at 280. Proof of such a mental state must usually be inferred from circumstances difficult to develop on motion for summary judgment.

The article in question was prepared by Newsweek's Sports Editor Peter Axthelm. In February 1968, Axthelm, then a reporter for Sports Illustrated, covered the New York Athletic Club track meet referred to in the Newsweek story. At that time he interviewed Vandenburg and attempted to interview some of the athletes on his team, but they refused to speak with him. He quoted Vandenburg in his article in Sports Illustrated, as follows: "I asked each one if he wanted to come and each one said yes. There was no pressure, I told them again tonight that they could back out and I would never hold it against them." His subsequent article in Newsweek was published without any interview with Vandenburg or with any of the athletes on his team. Axthelm testified that, while he had initially believed Vandenburg's statements, subsequent events had caused him to disbelieve them, and that his doubts had been confirmed from information provided by Anita Verschoth, a free-lance sports reporter; Samuel Skinner, sports editor for a San Francisco newspaper; and Harry Edwards, a well-known former athlete who had become a leader of the "black power" movement. Vandenburg vigorously attacked the reliability of Axthelm's sources of information. The Supreme Court has held that actual malice may be inferred when the investigation for a story which is not "hot news" was grossly inadequate in the circumstances. *Curtis Publishing Co.* v. *Butts, supra,* 388 U. S. at 156-158.

The two-volume, 650-odd page appendix contains extensive discovery, depositions and affidavits from which

Appendix D

FIFTH CIRCUIT'S *PER CURIAM* OPINION

the district court might properly have concluded that Newsweek had failed to show that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. *See Time, Inc.* v. *Ragano,* 5 Cir. 1970, 427 F. 2d 219.

The order denying Newsweek, Inc.'s motion for summary judgment is affirmed and the case is remanded for trial. We caution against attempting to glean from this decision any whisper of what the outcome should be on a motion for a directed verdict, on the final verict, or on a motion for judgment n. o. v.

AFFIRMED AND REMANDED.

APPENDIX E

Judgment of the United States Court of Appeals for the Fifth Circuit Affirming the Order of the District Court and Remanding the Case for Trial

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1970

No. 29451

D. C. DOCKET No. CA 68-124 EP

WAYNE VANDENBURG,

Plaintiff-Appellee,

versus

NEWSWEEK, INC.,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

Before RIVES, AINSWORTH and MORGAN, Circuit Judges

Appendix E

Judgment of the United States Court of Appeals for the Fifth Circuit Affirming the Order of the District Court and Remanding the Case for Trial

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court.

It is further ordered that defendant-appellant pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

April 5, 1971

APPENDIX F

Extracts from Depositions and Exhibits

EXTRACT FROM THE DEPOSITION OF PETER AXTHELM

Cross-examination by Vandenburg.

* * *

[270] *Q. Now, as a matter of fact several black athletes from the University of Texas at El Paso did go to New York and did go to Madison Square Garden and did participate or attend that track meet, did they not? A. Yes.

Q. Did you talk to any of them at that time? A. Yes, I attempted to, I talked to Bob Beamon and Leslie Miller but they didn't want to talk to anybody that night, they just said they didn't want to talk about [271] it prior to their——

Q. Was this before or after they participated? A. It was after, as I recall.

Q. Did you attempt to talk to any of the other athletes? A. No, the other El Paso athletes?

Q. Yes. A. No.

Q. And what about Coach Vandenburg, did you talk to him at that time? A. Yes, I did.

Q. What did he have to say? A. He told me that he had given each individual the opportunity not to compete. He referred to some, some vague threats that had been made, that the people who competed might get hurt, and he said that in the hotel room, motel room, I believe they were staying out near the airport, that he had asked each one if they wanted to back out in the hours before the meet and they said no, and he concluded his statement by saying, "Off the record, we've got to stop these people, somebody has got to stop these people, hold the line against

*All bracketed references are to the printed record filed with the Fifth Circuit.

Appendix F

AXTHELM, DEP.

these people" I believe was his exact phrase, "Someplace" and he reiterated with reference to Harry Edwards.

* * *

[272] Q. So, actually, in connection with the New York Athletic Club meet, other than Coach Vandenburg, you really didn't talk to anybody else? A. No, I made several attempts to talk to the athletes but they—they weren't talking to any reporters that they could help at the time.

Q. Did you, where did you try to talk to them, in the locker room, or out in the—— A. Oh, on the track, on the track surface.

Q. On the track surface. A. Everyone at a track meet, you just sort of circulate around and try to—

Q. It is customary, isn't it, that actually out in the center of the thing, whatever you call it, the track surface, is where most of this goes on, isn't it? A. Yes.

Q. And you are interviewing people, they're making comments about a race, or about politics or whatever? A. Yes.

Q. And likewise, where did you interview Coach Vandenburg? A. It was right in the middle of the course.

* * *

[274] Q. Did any of the people that you talked to tell you anything about the University of Texas at El Paso? A. Yes.

Q. And which people there did? A. Well, on several occasions the subject came up. At that time, of course, the athletes had already been removed from the El Paso team

Appendix F

so it was naturally a subject of some interest to black athletes everywhere—it was a subject that was discussed quite often, as a matter of fact, in track and field and at that time Edwards told me that he had, on his trip to El Paso, at a meeting with the Black Students Union, I've forgotten whether it was called the Black Students Union or Black Students Association, but anyway—

Q. The Afro-American Students something? A. Yeah, at a meeting there he had been told by a number of athletes that the El Paso, Texas black trackmen had been threatened with expulsion from the team before going to the New York A.C. meet and be-[275] fore the Brigham Young meet, at which they were expelled.

Q. What did he give you by way of support for that statement? A. Well, he said at this meeting it was discussed and a number of athletes had affirmed it. I didn't ask him at that time for specific names of the athletes.

* * *

[276] Q. Did anyone else ever either quote or state to you directly anything about events at the University of Texas at El Paso? A. Yes, we have another stringer in San Francisco, named Samuel J. Skinner, who is sports editor of Radio Station KDIA [the Court Reporter referred to radio station "KVIA" as "KDIA" throughout the transcript] and the sports editor of the Bay Area Negro Newspaper, the Sun Reporter. Sam, I considered to have, to be one of the best sources of information this black athlete situation because he has rapport with black athletes, being black himself, that, no one else that I have ever been aware of, has approached. He has a number of bits of information about various black movements in sports long before anyone else so we consider him a very valuable source, and he has done some work for us on other

Appendix F.

AXTHELM, DEP.

subjects, too; as a matter of fact, other sports stories out in California, but particularly I considered very good stories, and he told me that he spoke to Beamon—like many people he had been puzzled by Beamon's competing in the New York A. C. meet, particularly because most people know Bob's feelings on racial subjects and the need for protests. He couldn't understand why he had competed and he said that after the guys had been thrown off the team in an interview Beamon had left him the distinct impression that he, that they had been threatened before the New York A. C. meet. He had said something [277]—Bob had been very cryptic about this subject all along. As I say, he didn't talk at all at the meet and subsequently he gave, the strongest, what Sam Skinner felt was the strongest possible indication that there had been pressure exerted to keep, make them compete at the New York A. C. meet, and I believe Beamon indicated that in light of the Brigham Young events, in the light of the fact that they had been kicked off the team, Sam asked him a question, "Well, what about the New York A. C. meet?" and Beamon said, "Well, what do you think? Why do you think we would have competed?" This was his feeling at this time.

Q. No, no positive statement, though? A. Well, it was, Sam interpreted it, Sam felt it was about as positive a statement as, as Beamon could make, considering the fact that he had been very closed-mouth about the entire affair, so that was other information that I had. That wasn't probably, every bit of information I got about Texas at El Paso, but in the interim before writing the story this was some of it. Anita Berschoth [the Court reporter misspelled the name "Verschoth" throughout the transcript] in Los Angeles, our Los Angeles girl, had dinner with Wayne at the San Diego, I believe it's called the San Diego

Appendix I:

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Champion's Track Meet, and that would have been in May, late May, I believe. At that time I had asked her to go to that meet, I was not at the meet, I asked her to review a number of track subjects. I wasn't sure, I wanted to do, in other words, several items I wanted her to take care of for me, one of which was clear up—I was confused by the cryptic news reports as to what had happened to the El Paso athletes, to try and find out, asked her to find out what hap- [278] pened, what, and so she talked to, she had dinner with Wayne and she subsequently filed a story quoting him extensively about why he had, about the fact that the athletes had been kicked off the team and would stay off —at that time Beamon indicated to her that he had the understanding that their scholarships would be reconsidered at the end of the year and Wayne flatly told her they would not be, so that was one more, that file sent to me was one more factor in bringing me up to date on the situation.

* * *

[279] Q. All right, and you say this, you said you actually made a formal request of Anita Berschoth to get you some information on the University of Texas at El Paso? A. Yes, sir.

Q. And she did interview Coach Vandenburg? A. Yes.

Q. And you say she also talked to Bob Beamon? A. Yes.

* * *

Q. Were there any other University of Texas at El Paso athletes at that particular meet? A. I know Anita also talked to Bob Bethea at that meet. I don't recall if there were any others there, as I wasn't there and I just—Anita to find out about Beamon and Wayne.

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Q. Well, was Bob Bethea one of the athletes who refused to compete at Brigham Young track meet? A. I believe he was, yes.

* * *

[280] Q. Did she furnish any other information? A. Well,——

Q. Other than what you have related here? A. —the, her file on her conversation with Wayne is about two pages long, I think I have given you the substance of it a number of different quotes all affirming the fact that, what had happened.

* * *

[284] Q. A moment ago you said that he [Edwards] did tell you that when he was down here that he was told by athletes from the University of Texas at El Paso that they had been threatened with their scholarships if they failed to compete in the New York Athletic Club meet, that's correct, isn't it? A. Yes.

Q. And who did he tell you had said that, in other words—— A. I don't think—he said a number of athletes——

Q. This was obviously a conversation which he had—— A. Yes.

Q. —with black athletes here in El Paso—— A. In the context of a meeting and there was a number of athletes who said it.

Q. Well,—— A. He didn't give me any specific names at that time.

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[285] Q. But Harry Edwards gave you no quote from Wayne Vandenburg, is that right? A. No, he didn't give me any quote.

Q. And he gave you no quotes from any particular athletes? A. No.

Q. Just said—he said that when he was down here that "athletes"—did he mean track athletes—or was he talking about football and basketball—— A. It was a meet of all athletes.

Q. Meeting of all athletes,—that he learned from them, the athletes who attended the meeting and spoke with him—— A. Yes, sir.

Q. —that there had been coercion or threats which forced the black athletes from the University here to compete in the New York Athletic Club meet? A. Yes.

* * *

Q. Was there any other source of information [286] whether from a stringer or from a researcher that furnished you any basis for the part which refers or in any way alludes to the University of Texas at El Paso? A. No, my sources were the ones that I have mentioned—the facts that were reported in the New York Times and Associated Press about the Brigham Young meet, as well as the things that I had, had been told by Sam Skinner, Anita Berschoth, Harry Edwards, people that I certainly felt were, reliable.

* * *

[287] Q. In your article you say El Paso Track Coach Wayne Vandenburg threatened to kick six athletes off the team if they joined the boycott of the New York Athletic

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Indoor Meet in February. What's the source of information you have for that particular statement? A. Well, the sources that I just mentioned to you.

Q. Harry Edwards? A. Edwards, Edwards, Skinner, Skinner's conversation with Beamon.

Q. Skinner's conversation with Beamon. A. And——.

Q. Nothing in your report or your story from Anita Berschoth who covered that particular statement, is there? A. No, I don't believe that was mentioned.

* * *

[288] Q. It was the first incident—— A. Yes.

Q. —that you knew of—— A. Yes.

Q. —and had ever heard of? A. And I, of course, had, when Wayne had initially told me that he had not put pressure on them I had fully believed it, I had no reason to — I mean, I've always had a, as I mentioned, a relationship where I wouldn't have had any reason not to, and, and, respected his decision, you know, his feelings about the whole movement which he had expressed to me, but in the, in the interim I felt that the subsequent events, the way he had reacted at Brigham Young, plus Beamon's indication to Sam Skinner, the way the whole thing fit in, I felt that I had reason to believe the later statements, the later indications, that he had put pressure on his athletes.

* * *

[289] Q. But prior to writing this and publishing it in Newsweek, you didn't talk to him again about that? A. No, I knew his, I mean, I knew his, I knew he had made a full statement of what, what he felt.

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Q. But you published an entirely different report in Newsweek from what you said you had been told by Coach Vandenburg in New York? A. Yes, based on other sources that I felt were in the light of subsequent events, in light of the positions he had taken, I felt the other sources were more reliable.

Q. But before publishing this you didn't, in fact, go back and talk to Coach Vandenburg, did you? A. No.

Q. But you did know you were publishing this contrary to the statement he had previous given you? A. Yes.

Q. In a personal interview with him? A. Yes.

Q. Then in publishing this statement you knew at the time you published it that either what Coach Vandenburg had told you in New York City at the time of the meet was false or you knew that this statement was false, did you not? A. Well, I felt his statement to be false, yes.

Q. So in publishing this you felt that the interview, that the statement that he had personally made to you in New York City was false? A. Yes.

Q. And that's the intent in publishing that particular [290] statement? A. Well, the intent was to, to tell the facts as I understood them. I felt that out of—as I say, out of all the—it was such a minor part of the story, out of all the turbulent events trying to sum up what had happened I felt that, that the truth was and all my sources indicated that he had threatened them, yes.

Q. Well, now, you say a minor part of the story, but I believe a moment ago you said this was about a very significant event and in particular the University of Texas at El Paso. A. Well, I said significant in the sense, I said it was widely discussed, naturally, because it was so, it was

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one of the most dramatic examples of guys being disciplined or suspended, whatever you want to say, for their, for their racial standing.

* * *

[297] Q. As I take it, then, you consciously wrote that statement knowing that Coach Vandenburg had previously given you a directly opposite statement of the facts concerning the six athletes on the University of Texas at El Paso team—— A. Yes, I did.

Q. —in connection with their participation in the New York Athletic Club meet? A. Yes, I felt the other evidence that had come up since was true and I wrote it that way.

* * *

[298] Q. You wrote it yourself knowing that you had a previous quotation direct from Coach Vandenburg to the exact opposite effect? A. Yes, I wrote it based on sources that I felt in light of the events were more reliable.

* * *

[302] Q. Was there anything about his [Vandenburg's] or the way he said it that led you to suspect and disbelieve him at the time he said it? A. No, the, it was a major matter of interest to many people concerning Beamon's demeanor, concerning the athletes' demeanor, they were very nervous, [303] they didn't want to talk about it, they, it was somewhat out of character, particularly in light of later events, for Beamon to be there, in light of this position he has taken subsequently—it was—for him to go out of his

way and oppose the black boycott was a matter of considerable puzzlement to, to a lot of people, including myself, which was why I wanted to talk to him, but it was impossible for anyone to talk to him. The athletes were, of course, nervous and understandably so with all the pressures on them, and I just didn't want to create any more trouble by——

Q. What about Coach Vandenburg, was he nervous, as well? A. I would say concerned that there might be disturbances or trouble that, that, as I say, he was anxious to explain what——

Q. Explain. You mentioned Bob Beamon's position, had you ever interviewed Bob Beamon prior to the New York Athletic Club meet and learn what his feelings were about the black boycott and things like that? A. Well, I had, no, I hadn't tried to.

Q. So it was only *after* that, that when Bob Beamon did, in fact, thereafter engage in a boycott with other black athletes that you learned what his feelings were about black boycott? A. Well, yes, I learned it later, and at the time a number of athletes, several athletes, who knew him expressed to me that they couldn't figure it out why he was in there, if he wasn't being forced to participate, so there was an element of doubt from that night.

Q. Who were these other athletes—black athletes or —— A. Yes, yes.

[304] Q. What were they doing, those other black athletes? A. What were they doing?

Q. Yes, at the New York Athletic Club meet? A. Well, both at the meet and subsequent to the meet, people who knew Beamon just said, Lee Evans was one of them, he said he couldn't figure out, he had talked to Beamon about the black protest movement and he was shocked that Bob

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had decided to compete. Charlie Mayes, another long-jumper, mentioned that to me, outside of Madison Square Garden, that night,—he was in the picket line——

Q. Huh huh. A. —and he said he couldn't figure out why Bob would be in the meet, so, as I say, there were some questions and some doubts about it from the start and then in the subsequent months before I wrote this article, I got what I felt was very reliable, weighty evidence, that there had been pressure exerted on them.

* * *

[309] Q. What did he [Harry Edwards] tell you after he had been to El Paso and you then saw him about his trip here and the success of his trip? A. Well, he, he told me,—the information I referred to earlier about the meeting, that the athletes had told him that they had been threatened; that Wayne had used pressure to get them to go to the New York A. C. meet; he said that he had met with them and he was aware, had been aware that they were going to boycott the Brigham Young meet. I never——

* * *

Q. Then you talked to him [Harry Edwards] again about the same thing in San Jose in preparation for writing your article [310] A. Yes.

* * *

[315] Q. Now, getting to the source of your information, did Harry Edwards tell you whether or not—did Harry Edwards tell you or did you inquire of him what the source of his information was other than his own [316] personal participation in talking to these athletes? A. Well, that seems like a pretty strong source of information.

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Q. All right, but there's no, I'm trying to discount any other source of information. A. No, it was direct.

Q. And then when he told you that the athletes had told him that they had been threatened with loss of scholarships for not participating in the New York Athletic Club meet, you had no, he gave you no other source of that information other than they told me, so, therefore, I know it—in other words, his direct conversation with those same athletes? A. Yes, direct, yes, sir.

Q. Now, this was told to you by Harry Edwards when, this part about the athletes telling him that they had been threatened with the loss of their scholarship? A. I believe he told me that in San Jose in June.

* * *

[318] Q. You just took that from the wire services as it came out and adopted it? A. Yes.

Q. The next sentence says, "Vandenburg promptly dropped Champion Long-Jumper Bob Beamon and five others from the squad"—what source of information do you have for Coach Vandenburg promptly dropping them? A. Well, he announced at the Brigham Young meet, he was quoted on the wire services, as, when they did not compete, he said they have disassociated themselves from the team.

Q. Well, isn't "disassociating yourselves from the team" substantially different from being "promptly dropped"? A. No, I don't think he could have been much more "prompt" because the day they staged their boycott, to me, was clear, he told them beforehand, "You will, you will be dropped" or whatever, you could use the words "disassociated themselves from the team".

Q. But you are the one that used it first—— A. It's a, it's a matter of semantics,—the fact is that they did not

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want to disassociate themselves from the team and they asked to be reinstated, they, and when the Coach says flatly, "You are off the team and you will not get back on" and when he says it on the very day when the incident occurred, I think that "promptly dropped" is a fair description of it, or a true description of just what happened.

Q. When did they ask to be reinstated with relation to this "prompt dropping" that you are talking about? [319] A. Well, sometime afterwards there was a discussion—Wayne was asked by several people if the athletes would have a chance to get back on. At the dinner with Anita Berschoth that I referred to she asked him specifically, because at that time Beamon indicated that he had a hope that he would get his scholarship back the following year and she asked him about that and he emphatically said no. Lee Evans also protested about that and he emphatically said no.

* * *

[325] Q. And four or five days before publication was when you sat down and consciously made the decision to write that part of the story contrary to the personal interview you had had with Coach Vandenburg in February of 1968? A. Yes, based on all the information that I had in front of me at that time, trying to sum up the El Paso incident, as one of the incidents, and a few others which is the basis of the story.

* * *

[343] *Direct examination by Newsweek*:

Q. Let me ask you a few questions. In connection with the sources of information for your story, particularly

these two paragraphs that you wrote in the July 15th issue of Newsweek, have you seen a statement which your attorney took from Harry Edwards? A. Yes, I have.

Q. I will show you this and ask if this appears to be a copy of the statement that you saw taken from Harry Edwards by Mr. Leo Larkin? A. Yes.

Q. Referring to the statement, if you will, there, particularly on Page 2 at the bottom of the page—— A. Yes.

[344] Q. —did Mr. Edwards advise you that he had heard indirectly from John Carlos and other athletes, whose names he couldn't presently recall, that black athletes on the team had been told by Vandenburg that if they boycotted the New York Athletic Club meet they would be suspended from the team and lose their scholarships? A. Yes.

Q. Did he also communicate to you prior to your writing this article that he had heard these threats at one meeting in San Francisco, California immediately prior to the Los Angeles meet in January of 1968? A. Yes.

Q. Now, turning over to Page 5 of the statement—— A. Yes.

Q. —in 1968, the month is left blank, he states, "I was invited to speak to the students of the University of Texas in El Paso—I spoke to the student body, scheduled a closed meeting later that evening for black students. Almost no one showed up because of a conflicting night scrimmage, which had been scheduled for the same time. I, therefore, adjourned my meeting with the black students until the following morning. Approximately 150 met with me in a closed meeting. The black members of the University's indoor track team were not present, because they had gone off on a track meet. I asked those at the meeting about the

pressures I understood Vandenburg and the athletic department had placed on black members of the track team. A number of athletes, none of whom were on the track team, and some girl friends of other black athletes told me publicly at the meeting that the black members of the track team had been told by [345] Vandenburg that if they boycotted the New York Athletic Club meet they would, quote no longer be considered members of the team, end quote, and would lose their scholarships. I remember specifically being told the foregoing by one girl, two football players, and possibly one of the black basketball players. Was that information communicated to you? A. I don't remember the details about the scrimmage and the, the cancelled meeting, one meeting, and the other starting. Now that I, my recollection of it was that he had met with all the athletes, I didn't recall, that slipped my mind, that the track athletes had been off at a track meet, but as I mentioned, as I mentioned earlier, it wasn't something, the meeting was not something that I was directly involved in, in reporting at that time, so I didn't get the——

Q. And as you have been testifying this afternoon for some four hours about a good many facts, figures, dates and names, places and times without any notes—— A. Yes.

Q. Looking at this statement at the bottom of Page 6, did Mr. Edwards tell you that in May of 1968 while he was in Modesto, California, that he had talked with a sprinter on the University of Texas track team named Leslie Miller—did he tell you about his conversation with him? A. He, told me about talking with an athlete—I don't believe he named Leslie Miller at that time, he said, he had told me about getting information about the, about the facts mentioned here.

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Q. And that was from an athlete directly on the El Paso track team? [346] A. Yes.

Q. Can you recall specifically what Harry Edwards told you about his conversation with the black athletes on the El Paso track team in May of 1968, while he was in Modesto, California? A. Well, he said that the athletes had confirmed that Coach Vandenburg had threatened them prior to the New York A.C. meet.

Q. Then, did—I believe you have already testified that one of your sources of information, correspondent or stringers, as I believe is a slang term in your business, was Samuel J. Skinner? A. Yes.

Q. And he is a sports editor for,—what newspaper was it? A. The Sun Recorder is the newspaper, and he is also Sports Editor, I believe that's the style it would be, of KDIA radio station in San Francisco.

Q. And do you know whether or not in the past he has been a correspondent for Newsweek? A. Yes.

Q. On other articles, and other matters? A. Yes, he has.

Q. How about any other national publications? A. He has also done work for Sports Illustrated.

Q. And is Sports Illustrated a nationally circulated magazine in the United States? A. Yes, it is.

Q. And was it in the year 1968? A. Yes.

Q. Widely read by sports enthusiasts? A. Yes.

Q. Did Mr. Skinner advise you on several occasions [347] prior to the publication of your article that Coach Vandenburg had made, had threatened his black athletes, if they failed to run in the New York Athletic Club meet? A. Yes.

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Q. And by threatening of the black athletes, I mean threatening them with the loss of their scholarships? A. Yes.

Q. After the Brigham Young meet when you testified Coach Vandenburg dropped the black athletes from his squad, who refused to participate in the Brigham Young meet, did Samuel Skinner say anything to you or make any remark to you that you specifically recall? A. Yes, he did tell me at the time, something like, "see what I told you"—or "this proves what I told you about Vandenburg".

Q. Let me ask you this, Mr. Axthelm, is getting information for your articles that go into the sports page of Newsweek from correspondents such as Harry Edwards, Samuel Skinner and the other people that you have mentioned, Anita Berschoth, Lee Evans, is that usual and customary in your business? A. Yes.

Q. In other words, did you depart from any standard of sports reporting, the way that you got this information that you put in the magazine? A. No.

Q. Is, I believe you have already testified that Harry Edwards received a B. A. in, B. A. degree from Cornell University? A. Yes.

Q. And what other degrees does he have? [348] A. He has a Masters in Sociology, I believe. I would have to check. He has a Masters from Cornell, I believe, and an under-graduate degree from San Jose State.

Q. And do you know what he is studying at the present time? A. He is, well, he is studying Sociology for his PHd at Cornell, he is, what he is actually doing is writing books —he's completed one book already this fall and is working on three more.

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Q. And is he considered a reputable source of information by the news media in New York, to your knowledge? A. Yes.

Q. How about Mr. Samuel Skinner? A. I think Sam is widely respected in his business on the west coast.

Q. And with the small staff that Newsweek Magazine has for gathering information, do you have to rely on sources of information that you believe to be reputable? A. Yes.

Q. And did you, at the time you wrote this article, believe your sources of information to be reliable? A. Oh, definitely.

Q. Did you believe that the statements that you made in this article to be true? A. Yes, definitely.

Q. Now, then, much has been made, Mr. Axthelm, over the fact that at the New York Athletic Club meet Mr. Vandenburg told you that he had not threatened his black athletes with loss of their scholarships if they did not participate, and yet the opening sentence in [349] the paragraph complained of here is to the contrary. Would you please state, you have been asked about this before, but it has been somewhat, a question here and then twenty minutes later a question there, would you please state in your own words why you made this statement, the first sentence, that, to the effect that Vandenburg threatened to kick six athletes off his team if they joined the boycott of the New York Athletic Club meet in February, when Vandenburg had previously told you at that meet that he hadn't so threatened them? A. Well, in the time between his statement at the meet and the time that article was written, so many facts had come up to indicate that Vandenburg *had* pressured his

athletes, that I felt that the facts were that he had pressured them—that information had come to me from Harry Edwards, Sam Skinner, from the sources we talked about, and in addition, of course, the, Wayne's handling of the Brigham Young incident and his quick decision to act that strongly at Brigham Young, obviously added a lot of credence to the idea that he had acted strongly at the New York A.C. meet. This, in addition to remarks that I mentioned that Beamon had made to Sam Skinner and so forth. It was consistent with Wayne's handling of the Brigham Young thing to, and in light of these other facts, to feel that he had handled the New York A.C. thing the same way.

Q. In other words, would it be fair to say that the first time the black athletes on the UTEP team boycotted a track meet, they were kicked off the team? A. Yes.

Q. And that was at Brigham Young? [350] A. Yes.

Q. Also Mr. Axthelm, after you talked with Mr. Vandenburg at the New York Athletic Club meet in February, and Mr. Harry Edwards had an opportunity to come to El Paso and actually talk with black athletes and then report back to you? A. Yes, that was one of the sources of information that led to that conclusion.

Q. And then did you also subsequently get information through John Carlos, who had talked to, directly to a member of the El Paso team, who had told him that the same threat or pressure was put on the black athletes to participate in the New York Club meet as was put on at Brigham Young? A. Yes.

Q. Did you also have information by the time you wrote this article to the effect that Anita Berschoth had confirmed personally with Coach Vandenburg that not only had, was

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he treating these black athletes as quote having disassociated themselves from the team, end quote, but that he was not going to reinstate them? A. Yes.

Q. Did that appear to be a rather firm and definite attitude to you as sports editor? A. Yes, definitely.

Q. Now, then, in this article that appears in Newsweek, did you say any thing critical of Coach Vandenburg? A. No, it's just a report on what happened.

Q. Did you criticize his right to withdraw scholarships from athletes who refused to participate in an athletic meet? [351] A. No.

Q. Do you understand that a Coach has that right? A. Of course.

Q. Is there anything in what you wrote here that says Coach Vandenburg was wrong or shouldn't have done it or he is a racist or anything along that line? A. No.

Q. Did you intend to convey any such impression? A. No.

Q. Were you reporting what you thought to be the true facts, or a summary of them? A. Yes.

* * *

[356] Q. All right, Mr. Axthelm, you have testified a little earlier that Coach Vandenburg told you at the New York Athletic Club meet that he had left the decision to participate in that meet optional with the members of his team? A. Yes.

Q. But yet at the same time Coach Vandenburg did make the remark quote someone has to hold the line against these people end quote, referring to Harry Edwards and his group, who were trying to get black athletes to boycott

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the meet. Did that latter statement, made directly to you, by Coach Vandenburg raise any question in your mind? A. Well, to some extent. I, like many coaches, I mean it certainly wasn't an unusual statement to hear from a coach, like many coaches Wayne was [357] distressed, as any coach tends to be, at a movement which was, which basically has as one of its goals undermining a lot of the things that black athletes have gone along with for a long time—any movement that encourages athletes to take things into their own hands, whether it is boycotting or making demands, or whatever, obviously is distressing to a coach. This is what he was referring to and it did, at the time, I mean, it made clear his feelings to me that he definitely wanted to be part of anything that was going to slow down such movement.

Q. Did it make you feel that he wanted his black athletes to participate in that meet? A. Yes.

Q. Did it also make you wonder if he hadn't used a good deal of persuasion, if no threats, to get his black athletes to participate? A. Yes, as I said, it was, it was a puzzling thing, at the time, and I think everyone was wondering what was going on.

Q. And then when you attempted to interview Bob Beamon at the New York Athletic Club meet as to why he had participated in the meet over across the picket line of the black boycotters, and Beamon refused to talk with you? A. Yes.

Q. Did that make you wonder if he were under any sort of coercion to participate and to cross the picket line set up by the black group in New York? A. Yes.

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Q. In other words, were there some doubts in your mind from the very beginning about what Coach Vandenburg had told you? [358] A. Yes.

* * *

Q. From your correspondents among the black community and those connected with the sports field, would you say that it was generally known among them that Coach Vandenburg was going to withdraw the scholarship of any member of the track team that refused to participate in a track event, whether invitational or regularly scheduled, that he wanted them to participate in? A. Well, yes, it was certainly generally known after the Brigham Young incident and it was generally felt before that, too. Obviously he made, he made the flat statement of it at the, after the Brigham Young meet—so anybody with any doubts was cleared up then.

[359] Q. Did most black athletes refuse to participate in the New York Athletic Club meet in February of 1968? A. Yes.

Q. Do you recall approximately how many black athletes participated in that New York Athletic Club meet? A. I believe it was nine.

Q. And do you recall approximately how many of them were from the University of Texas at El Paso? A. I believe there were six.

Q. Did that further raise any doubt in your mind as to whether or not Coach Vandenburg had, in fact, exerted pressure on his athletes to participate? A. Well, that fact, naturally, made the presence of the El Paso athletes the center of speculation.

* * *

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[360] Q. Did Harry Edwards ever tell you that he realized the pressure that the black athletes from El Paso were under at the time? A. On several occasions, yes.

Q. When they participated in the New York Athletic Club meet? A. Yes, on several occasions he, he cited the fact that they were threatened.

Q. Did all of these facts and circumstances, which you subsequently gathered, after Coach Vandenburg made the statement that he had not threatened any of them, tend to confirm the fact that he must have put pressure on them to participate in the New York Athletic Club meet or under threat of losing their scholarships? A. Yes.

* * *

Re-cross examination by Vandenburg

[363] Q. I see, so what you are saying is that your view of the facts about the athletes boycott of the Brigham Young meet and any action that Coach Vandeburg took in that regard, proves to you or satisfies you that Coach Vandenburg likewise exerted pressure, made threats of loss of scholarships and otherwise, to make the Negro athlete participate in the New York Athletic Club meet? A. No, no, it didn't prove, alone it would not prove anything, but it backed up the reports I had also received from Skinner, and from Edwards, and from the various other sources we've been talking about, and added that much more weight to the other body of facts we already had.

* * *

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[364] Q. Now, I believe you said that Harry Edwards, you believed to be a reliable source of information? A. Yes.

Q. And John Carlos, do you believe him to be a reliable source of information? A. Yes.

Q. And Lee Evans, do you believe him to be a reliable source of information? A. Yes.

Q. And Tommy Smith? A. Yes.

Q. Do you believe him to be a reliable source of information? A. Yes.

Q. Any particular reason why you should believe these individuals reliable sources of information? A. Well, I, I've never had any reason to—I mean, I've always felt, found them to be reliable in all my dealings with them.

Q. I see. Up until you wrote this article did you find that Coach Wayne Vandenburg was a reliable source of information? A. Yes.

Q. And up until you wrote this article did you believe that he could be relied on? What he told you? A. Well, as I mentioned, there was so much doubt surrounding his actions at the New York Athletic Club meet, I had doubts as I mentioned from the time that he made his statement to me, and naturally [365] followed it up, pursued it with interest when I, when I got other information about it.

* * *

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EXTRACT FROM THE DEPOSITION OF JOHN CARLOS

Direct Interrogatories by Newsweek

* * *

[543] Q4. Please state whether or not you know Coach Wayne Vandenburg. A. Yes.

Q5. Please state approximately how many times you have met or talked with Coach Wayne Vandenburg. A. We have seen and spoken to each other for about 20 or 25 times.

Q6. Please state whether or not you are acquainted with Bob Beamon, and if so, state the extent of your acquaintance with him and his athletic achievements. A. Yes. Bob Beamon is a very close friend. We grew up together, we ran for the New York Pioneer Club together, it is a track club. Bob Beamon is current world record holder of long jump, indoors and outdoors, Olympic champion.

Q7. Please state whether or not you talked with Bob Beamon at the time of the Brigham Young University Track Meet in April of 1968. A. Yes, we had a conversation over the phone.

Q8. If your answer to the foregoing question is in the affirmative, please state the substance of what Bob Beamon told you on that occasion as to what had happened to him when he refused to participate in [544] said Brigham Young Track Meet held in April of 1968. A. I called him and I knew that out of hearsay that he had been thrown off the team, and I don't go by any hearsay, he is a very close friend of mine, being that I was in Texas a year and a half myself I knew how bad it could be for a Black

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athlete. I wanted to know if he needed any money or anything to get back to New York. So Bob said no, he was not on a scholarship but he thought he could stay in school there.

Q9. Please state whether or not Coach Wayne Vandenburg ever admitted to you personally that he had kicked off his track team those Black athletes who refused to participate in the Brigham Young University meet held in April of 1968. A. If I remember correctly, we were at one of the meets, California relays or Fresno relays, and we were in the cafeteria, and I said it was kind of harsh what he did to athletes there about not participating in the meet, and he told me he was the coach, and the athletes were supposed to do what he said, and if they couldn't do it they would have to get off the team. This is out of content, what I can remember. I don't remember the exact words, but this is what he was saying.

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[545] Q11. (b) State briefly what you said to Coach Wayne Vandenburg in this regard and his reply, to the best of your recollection. A. I asked him why did he have the athletes go to the New York A. C. when there was so much picketing and so forth going on there. I asked him about the risk of the guys getting killed or hurt there. And he made a statement to me pertaining to Bob Beamon because I named Bob Beamon, and he made the statement to me that Bob lived in New York, and it would be an opportunity for Bob to get back home and see his mother.

Q12. Did you ever talk with Bob Beamon to ascertain whether he was in fact removed from the track team of the University of Texas at El Paso and, if so, state whether

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it was on one or more occasions, and the substance of his reply. A. I asked him over the phone and he told me he was no longer on the track team because he refused to compete in the Brigham Young competition or track meet. This was a meet held at the Brigham Young University.

Q13. Please state whether you are acquainted with Mr. Peter Axthelm, Sports Editor of Newsweek [546] Magazine, and if so, for what period of time you have known Mr. Axthelm. A. I met Mr. Axthelm in the year 1968. And I have known him for a period of a year and a half or so.

Q14. Please state whether or not, prior to the publication of the article entitled "The Angry Black Athlete" in the July 15, 1968 issue of Newsweek Magazine, you told Mr. Peter Axthelm that Bob Beamon would never have participated in the New York Athletic Club Meet held in February of 1968, unless pressure had been applied upon him and the other Black athletes on his team to participate in such meet. A. I told Mr. Axthelm about Bob Beamon. As far as the other athletes are concerned, I know them but I don't know them that personally. I know Bob would not have risked his life to go in and jump in a meet. Bob would have never gone through all of the changes that they went through to get into this meet, such as going and getting a limousine underneath the Garden to get in.

Q15. If your answer to the preceding question is in the affirmative, please state whether or not you believed such statement to be true at the time you conveyed such information to Mr. Peter Axthelm. A. I believe it with all my heart and soul.

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Cross-interrogatories by Vandenburg

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[560] XQ158. If your answer to the preceding question was in the affirmative, did you repeat in full detail to Peter Axthelm the exact conversation between you and Coach Wayne Vandenburg that you have previously testified to; and if your answer is in the negative, state to the best of your ability the exact words that you related to Peter Axthelm. A. As I said, I don't recall telling him about Vandenburg telling me that this was a chance for Bob to go back to see his mother, but I remember telling Pete that as well as I know Bob, Bob would not go into the Garden with all the people picketing and boycotting, and go through all the procedures that he did have to go in and perform, such as going into the Garden up through the basement, and stuff like that.

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EXTRACT FROM THE DEPOSITION OF HARRY EDWARDS

Direct interrogatories by Newsweek

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[382] Q13. Please state whether or not, prior to the New York Athletic Club Invitational Track Meet held in Madison Square Garden in February of 1968, you had heard, either directly or indirectly, that Black athletes on the track team at the University of Texas at El Paso had been threatened with suspension from the team and loss of their scholarships if they refused to participate in such meet. If your answer is in the affirmative, please state to the best of your recollection how and where you got such information. A. Well, first thing was that through our organizing activities we had a pretty good idea about who was going along with the boycott and who was not, and it became clear that athletes from the University of Texas at El Paso, because of the statement made in the press and other places, they were not committed to the boycott of the New York Athletic Club, as, perhaps, [383] we felt they should be. So, we had a number of athletes get in touch with Black athletes from the University of Texas at El Paso at various track meets which came prior to the New York Athletic Club meet, and it was basically via these contacts that we found that by the coaching staff or the Athletic Department or both; but it usually came up—the name most closely attached was that of Vandenburg, the head Track Coach at the University of Texas at El Paso—these people had been threatened with loss of their scholarships and grant-in-aid.

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Some had come from as far away as from New York City and the east coast to go to the University of Texas at El Paso, and they just did not feel they could boycott the games under those circumstances where they had no other means of support and would be stranded in Texas. We heard this from athletes, people such as John Carlos and Lee Evans, some newspaper people who had spoken with some of the athletes, but primarily from the athletes themselves, Carlos, Evans, people who had talked to these individuals, and for this reason we were never critical of the athletes at the University of Texas at El Paso during that period of time. We publicly criticized anyone who came out against the objectives of the Olympic Project for Human Rights, which the boycott was part of, but we did not criticize people of the University of Texas at El Paso because we recognized, we felt that they were under these pressures, and in the sense we had no alternative at that time to offer them as far as support was concerned that we could not very well blame them for doing what they did, although we did not agree with it, which was the act of participating in the New York Athletic Club Meet.

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[384] Q16. Please state, if you know, approximately how many Black athletes participated in the New York Athletic Club Invitational Track Meet in February of 1968, and approximately how many refused to participate because of the organized boycott. A. There were approximately nine that participated, and I think six of those placed, five of whom were from the University of Texas at El Paso. I'm not sure about this. This is my recollec-

tion. The athletes who boycotted, and here it's difficult to say because of the number of high schools that also boycotted the Meet. Colleges, high schools, universities, military academies, most of these boycotted the Meet, and I'm not sure how many Black athletes were in them, but I do know there were only nine who participated. So I would think there were—probably the number who boycotted were somewhere in the two hundreds, counting high school athletes, military academy athletes, [385] college athletes, unattached athletes.

Q17. Please state whether you know Mr. Pete Axthelm, Sports Editor for *Newsweek* magazine, and, if so, when you first met him, to the best of your recollection. A. Yes, I do. To the best of my recollection I met Pete Axthelm for the first time in New York City. I guess it was some time in February, and I was introduced to him by John Rogers, who was a sports writer also for *Sports Illustrated* at that time. I may have talked to Peter Axthelm on the phone with regard to the movement prior to that time, prior to meeting him firsthand, but I couldn't say precisely when, because I talked to sports writers, maybe 15 or 20 a day, every day for a considerable period of time. So I couldn't actually tell you exactly when I first talked to him, but I met him for the first time prior to the New York Athletic Club Meet.

Q18. Please state whether or not there was a meeting or gathering of sports reporters at a time and place when you were present at the time of the New York Athletic Club Invitational Meet in February of 1968. If your answer is in the affirmative, please state where and when such meeting took place and the names of the sports reporters present

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whom you can recall. A. The meeting did take place. It took place in my hotel room, and I don't even remember the name of the hotel I was staying in, much less the sports reporters who were present, because you never get the sports reporters'—they typically get your name, me being the person they're interviewing, and I very seldom get theirs, and at that time I didn't know very many of them, anyway, but Axthelm was among those [386] who were there, and I did —am sure at that time we did discuss the athletes who were participating. This was—the central theme of the whole discussion during that particular time was the athletes who were participating and the probable reason why they were, and Axthelm was among those individuals who were there.

Q19. If you have answered the preceding question in the affirmative, please state whether or not Pete Axthelm and John Rogers were present at such meeting. A. Yes.

Q20. If you have answered the preceding question in the affirmative, please state whether or not there was any discussion by those present as to any pressure being applied by Coach Vandenburg upon the Black athletes of his track team to participate in the New York Athletic Invitational Track Meet. A. This was the central theme of the entire discussion, because the number of Black athletes who had decided to boycott the meet was so great it was actually rather befuddling as to why the athletes from the University of Texas at El Paso would participate under such circumstances, and the primary reason that we had found that—and that I still believe to be true based upon our discussions with other athletes, with athletes who had talked with athletes from the University of Texas at El Paso, was that the athletes had been threatened with regard to the—

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to their retaining their scholarships, athletic grants-in-aid, and the name that was most frequently associated with having communicated with the athletes that they would no longer be considered part of the University of Texas Athletic Team was Wayne Vandenburg, the [387] Head Track Coach, and I still believe that to be true. This is all the information that we had on why the athletes from the University of Texas at El Paso would participate. It went essentially back to the same thing. Practically every other school where there were Black athletes dropped out. They dropped out. Every other school where there were Black athletes dropped out or sent all White delegations, such as the University of California at Berkeley. They sent an all-White 400-meter relay team, and the Black athletes had simply refused to go. This was the central theme, why would the Black athletes at the University of Texas at El Paso participate under those circumstances, and every time all the answer we got from other athletes from other informational sources went back that Wayne Vandenburg had threatened them with suspension of their scholarships and grants-in-aid if they did not participate, and this was what was communicated to Pete Axthelm and other sports reporters, and I still believe it to be true.

* * *

[391] Q27. Please state whether the athlete or athletes referred to in the preceding question confirmed to you personally in May of 1968 at the California Relay Meet that Coach Wayne Vandenburg had threatened to kick the Black Athletes off his track team if they boycotted the New York Athletic Club Meet which was held [392] in February of

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1968. A. Yes, he [Lennox Miller] did. He stated that Vandenburg had warned them that this would, in fact, happen if they boycotted any scheduled meet, and after the Brigham Young Meet, the athletes were, in fact, kicked off. Vandenburg had issued that warning as the Head Track Coach and they were, in fact, kicked off. It was not a surprise to them that this would be the price that they could possibly pay. They had been threatened in that fashion prior to being—having the scholarships taken away, but they went ahead and did it anyway. It was no surprise to them and they had known of this warning having been issued prior to the New York Athletic Club Meet.

Q28. At the time of your conference with the athletes from the University of Texas at El Paso track team at the California Relay Meet in Modesto, California, in May of 1968, please state the substance of what the athlete or athletes related to you as to why Black athletes from the University of Texas at El Paso track team participated in the New York Athletic Club Meet held in February of 1968, in spite of the boycott of such meet by the Olympic Committee For Human Rights or other civil rights organization. A. Essentially his statement was that they had been warned that if they boycotted the regularly-scheduled meet at the New York Athletic Club, which is perhaps or was perhaps the biggest of the indoor meets, that their scholarships would be suspended and that they had at that time no other alternative means of support. Many of the Black athletes at the school were struggling as it was with their scholarships, and if their athletic grants-in-aid were taken away or suspended, [393] many of them would be stranded in Texas, and this was the primary reason for participating.

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[395] Q33. Please state, if you know, whether any of the Black members of the track team at the University of Texas at El Paso who boycotted the Brigham Young University Track Meet held in April 1968 were kicked off the team or lost their scholarships. A. Yes. All who did not make the ~~trip~~ lost their grants-in-aid. They lost their athletic scholarships, and this was something they had taken into consideration, and one possibility that was discussed when I lectured at the school in April there, that same year, 1968, I guess. They were aware that this possibility was a possibility, because they had been warned.

Q34. Please state whether or not you are familiar with the article published in the July 15, 1968, issue of *Newsweek* magazine, entitled "The Angry Black Athlete." [396] A. Yes, I am.

Q35. Please state, if you know, whether the following paragraph from the article inquired about in the preceding question is true in all respects from your investigation of the facts, to-wit:

> "At El Paso, track coach Wayne Vandenburg threatened to kick six athletes off the team if they joined the boycott of the New York Athletic Club indoor meet in February. The club was charged with discriminatory membership policies. Vandenburg won and the athletes competed. But two months later, after a talk with Harry Edwards, the same athletes refused to enter a meet at Brigham Young University in Utah because of Mormon doctrines about blacks. Vandenburg promptly dropped champion long-jumper Bob Beamon and five others from the squad."

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A. That is true, and the only statement that I would clarify in that is that—the part that says, "after a talk with Harry Edwards." After some of the Black athletes had talked with me at the University of Texas at El Paso and possibly communicated to the track team the statements and the issues that we had discussed with regard to Brigham Young and also New York Athletic Club, that the Black athletes had decided to boycott the Brigham Young Meet, given the circumstances stated above with regard to the religious holiday and the Mormon doctrine and the [397] assassination of Martin Luther King and also the insensitivity of the Athletic Department and Vandenburg, in particular, to the feelings of Black athletes regarding these issues. As far as I am concerned, that statement, with the qualifications and clarification regarding that particular portion, is totally and completely accurate.

Q36. Please state whether or not, prior to the publication of said article in the July 15, 1968, issue of *Newsweek* magazine, entitled "The Angry Black Athlete," you had personally told Mr. Pete Axthelm that the facts stated in the paragraph of said article quoted above were true.
A. This is true. On numerous occasions we had discussed the situation at the University of Texas at El Paso. I believe that to be true now. All the information that we have now from other athletes and from some of the people at the University of Texas at El Paso corroborate that fact. I believed it to be true then; I believe it to be true now.

Q37. Please state whether or not prior to the publication of said article entitled "The Angry Black Athlete," published in the July 15, 1968, issue of *Newsweek* magazine, you had personally told Mr. Pete Axthelm: (a) Of your

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meeting with Black students at the University of Texas at El Paso held in El Paso Texas, in April of 1968. A. Yes.

Q37. (b) That Black athletes attending the University of Texas at El Paso had confirmed to you at your meeting with them in El Paso in April of 1968 that Coach Vandenburg [398] had advised the Black athletes on his track team that they would no longer be considered members of the track team and would lose their scholarships, if they boycotted the New York Athletic Club Invitational Track Meet held in February 1968. A. Yes.

Q37. (c) Of your meeting with a Black athlete from the University of Texas at El Paso track team in Modesto, California, at the time of the California Relay Meet in May of 1968. If your answer is in the affirmative, then, please answer the following question. A. Yes.

Q37. (d) Did you tell Mr. Pete Axthelm that such athlete had personally confirmed to you that Coach Wayne Vandenburg had threatened to kick those Black athletes off his track team who boycotted the New York Athletic Club Meet held in February of 1968? A. Yes. They had been warned before the New York Athletic Club Meet; they had been warned before the Brigham Young Meet by Vandenburg.

Q38. If you have knowledge of any other facts bearing upon the truth or falsity of the matter set forth in that paragraph of the *Newsweek* article quoted in Question No. 35 above, which have not been previously elicited from you in the foregoing questions, please state such facts here. A. As far as I am concerned, that's the whole [399] answer of the whole thing. That's the complete story.

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Q39. Please state whether or not you believe the facts stated in that paragraph of the *Newsweek* article quoted in question No. 35 above were true at the time such article was published from your investigation outlined in your answers above. A. I believe those statements to be true then and I believe them to be true now, and as far as I am concerned, the fact that the athletes were kicked off after the Brigham Young Boycott further corroborates the fact that it was the policy of Vandenburg and also of the Athletic Department that anyone who boycotts scheduled meets is automatically suspended from the team. I believed that to be true then and I believe it to be true now.

Q40. Please state whether or not, from your investigation, you now believe that all of the facts stated in that paragraph of the *Newsweek* article quoted in question No. 35 above are true. A. Yes.

Cross-interrogatories by Vandenburg

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[464] Q163. Did you make clear to Pete Axthelm on the occasion of your telling him the matters described in Direct Interrogatory number 37 that none of the six Black athletes from the University of Texas at El Paso who did participate in the New York Athletic [465] Club Invitational Track Meet in February, 1968, were present on the occasion in El Paso, Texas, in April, 1968, that you referred to? A. I made it clear to Pete Axthelm that at the meeting of April, 1968, the athletes were not present but that I had corroborated the reports that I and members of my staff had got in April of 1968 in particular, as well as during other periods of time, with one athlete from Univer-

sity of Texas at El Paso who stated that the reports were correct, and who also stated that they had, in fact, as a result of the Brigham Young boycott, lost their athletic grants-in-aid; that they had been taken away from them. This is what I made clear to Pete Axthelm. I believed the assertions to be true; that the people—athletes in Modesto had corroborated it to me and that members of my staff had had many assertions corroborated, with Black students at the University of Texas at El Paso and also other Black athletes from there.

Q164. Did you make clear to Mr. Pete Axthelm that any confirmation which you gave him with respect to the facts referred to in Direct Interrogatory number 37 (b) did not come from any member of the University of Texas at El Paso Track Team, but was instead hearsay from some third party? A. No, I didn't. I made it clear to him that the events that we had had been gathered from—by my staff and by myself. I had spoken to one athlete on the track team who had had a scholarship taken away as a result of the Brigham Young affair. Members of my staff had talked to other members of the track team who had had their scholarships taken away as [466] a result of the Brigham Young affair, and as far as I was concerned, it was not hearsay. It had been corroborated by the athletes, themselves, as far as I was concerned. It had been corroborated to the extent that I felt that we could move against the University of Texas at El Paso. That is how true I felt the assertions made by athletes and other students to be, and so as far as my communications with Pete Axthelm were concerned, I told him that I had both spoken directly to athletes, that members of my staff had spoken

to athletes on the track team, and that I had also made a trip, myself, to the University of Texas at El Paso to investigate the situation for my own political purposes, only. So, I—in communicating this to Pete Axthelm, I made no mention of hearsay. I communicated it to him as what I believed it to be, cold fact, and I also told him that we had talked to a number of athletes; that I had investigated the time that I had gone to the campus and talked to the students firsthand, and also told him that the athletic staff had refused to see me at all at the University of Texas at El Paso.

Q165. With respect to the facts referred to in Direct Interrogatory number 37 (b), did Pete Axthelm ask you whether you had seen or talked to Coach Wayne Vandenburg? A. He asked me had I talked to Vandenburg, and I told him no, I had never talked to Vandenburg, and I think at this point I informed him all the coaches at the University and the atheltic directors had refused to see me at all; that I had no discussion with them whatsoever.

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[467] Q167. With respect to the facts referred to in Direct Interrogatory number 37(b), did Mr. Pete Axthelm ask you whether or not you had talked to any of the six Black track athletes of the University of Texas at El Paso who participated in the New York Athletic Club Invitational Track Meet in February, 1968? A. Yes, he did, and I told him at that time that I did not recall whether—I know I had not talked to Beamon. I did not recall whether any of the athletes I spoke to had participated in the track meet, but I do recall that I talked to those who

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had boycotted the Brigham Young Meet and then—but my staff did talk to people like Beamon, did talk to other individuals, and the statement was the same, that they had been threatened with removal of the scholarships, but as far as—I do not recall, really, whether Axthelm—whether I specifically told Axthelm that I had talked directly to an athlete that I knew had participated in the meet at Madison Square Garden. I do recall telling him that I had talked to Black athletes from the University of Texas at El Paso who were on the track team during the time that the Black athletes from the University of Texas at El Paso did participate in the New York track meet, and they did corroborate the notion that Vandenburg had threatened them with taking away their scholarships, and that, in fact, he had done just that after the boycott of the Brigham Young Meet.

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EXTRACT FROM THE DEPOSITION OF SAMUEL JOSEPH SKINNER, JR.

Direct interrogatories by Newsweek

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[511] Interrogatory No. 8: Please state whether you are acquainted with Peter Axthelm, Sports Editor of *Newsweek,* and, if so, for what period of time. A. Yes; acquainted with Pete about two-and-a-half years now. He's Sports Editor, now, *Newsweek* magazine. When I first met him, he was writing sports for *Sports Illustrated.*

Interrogatory No. 9: Please state whether, prior to July 15, 1968, you supplied information to Mr. Axthelm in connection with his preparation of the article published in the July 15, 1968 issue of *Newsweek* magazine, entitled "The Angry Black Athlete". [512] A. Yes, I supplied information to him.

Interrogatory No. 10: Please state whether or not you are familiar with that article, and, more particularly, with the following paragraph thereof:

> "At El Paso, track coach Wayne Vandenburg threatened to kick six athletes off the team if they joined the boycott of the New York Athletic Club indoor meet in February. The club was charged with discriminatory membership policies. Vandenburg won and the athletes competed. But two months later, after a talk with Harry Edwards, the same athletes refused to enter a meet at Brigham Young University in Utah because of Mormon

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> doctrines about blacks. Vandenburg promptly dropped champion longjumper Bob Beamon and five others from the squad."

A. Yes, I am familiar with that particular quote, and very versed with the article.

Interrogatory No. 11: Please state whether or not you supplied Mr. Axthelm with any of the information which appears in the paragraph quoted in Interrogatory 10. A. The paragraph? Yes, I was versed with that particular information, because it was an understanding from talking to several Black athletes from University of Texas—El Paso concerning the situation. They had indicated that they competed because Coach Vandenburg had—I don't—I don't know if the word "threatened" should be used, because, "threatened" can be harsh.

Let's put it this way: Wasn't of their own free choice they competed in the New York AC meet.

[513] One of the particular persons that I talked to regarding the situation was longjumper Bob Beamon. And he was—he—the first time I talked to him about it, he was very hesitant about talking about. And that was at—I think it was the AAU Championship at the Coliseum or Athens meet at—I think it was the AAU meet at the Coliseum in Oakland. And I mentioned to him about the fact of him not competing at—back in New York AC, when all the other Blacks had pulled out. And he was very hesitant then about talking about the situation. And, you know, he kind of gave me that blase type—and most

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brothers understand that: Hey, man, I can't be talking about the thing, because, you know, things are in jeopardy. And, you know, I understood and I recognized the brother was in that type of position. I didn't fulfill—I didn't go through with trying to question him any more.

* * *

Following—the next time I saw Bob Beamon—this was sometime after he had been dismissed, or, as Beamon said to me over the phone the following day after Coach Vandenburg told the other brothers that they were no longer on the team, he used the word—he used the words "disassociated from the team." He then told me that, you know, "What do you think, man?", when I asked him the question about, you know, "Did you—the reason you guys competed at New York AC was Coach Vandenburg told you you [514] had to?"

And he then, at that time, stated to me that, you know, "What do you think, brother?", with that smile on his face, you know, which is kind of like a code a brother know and, another brother seeing, he don't have to come out and say: Yeah, man, that's what happened. It just was understood: Yeah, this was what happened, man, and it wasn't nothing we could do about it.

And then, after the Olympics, I talked to him again and he was here for the *Examiner* Invitational Indoor Track Meet at the Cow Palace, and I brought it up again to him in front of the Jack Tar Hotel, and he said, "Wasn't nothing we could do, you know," he said.

Well, I asked him, "I mean, why didn't you leave Texas—El Paso? Why you staying down there?"

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He said, "Man, I just want to get that paper, get out of school, get that paper."

I understand, now, he's since stop staying in Texas—El Paso. I don't know why—I haven't been able to talk to him about, but he's located now in New York City, which is his home, really.

As I say, I'm quite versed about this particular paragraph and supplying Pete Axthelm with some of the information.

I got a lot of stuff I got from Harry; a lot of stuff I got from telephone conversations with different brothers on the—different universities, different schools relating what was going on down there.

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[517] Interrogatory No. 15: Please state whether you have any information that Coach Wayne Vandenburg threatened to drop any Black athletes from his track team or not renew their scholarships if they refused to run in the Brigham Young University track meet in April of 1968. If your answer is "yes", please state how or from whom you obtained such information. A. I talked to—the very day the brothers went back over to Vandenburg's house to talk to him about the situation, I talked to them by phone at Bob Beamon's house. I was in Oakland, California. I talked to them long distance and recorded what was going on. That's when they used that phrase that Coach Vandenburg is "disassociating us from the team."

I tried to get him to say, you know, does "disassociation" mean he is kicking you off the squad? But, they kept using the word "disassociate."

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I didn't get around the word "he kicked us off the squad" until the following week.

As I and you know, AP and UPI began to use the term "Vandenburg had dismissed the fellows from the squad." But, yes, I am familiar with that.

Interrogatory No. 16: Please state if you [518] have any information to the effect that Coach Vandenburg did in fact drop those Black athletes from his track team who refused to participate in the Brigham Young track meet in April of 1968. If your answer is in the affirmative, please state how or from whom you ascertained such information. A. Associated Press and United Press International; television; and from Beamon and the six Blacks, at least, who were at his house that particular day. They stated clearly they were off the track squad and we recorded it and went on the air with it from their own lips.

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Interrogatory No. 18: Please state whether or not Mr. Harry Edwards advised you prior to July 1, 1968, that Coach Wayne Vandenburg had threatened to kick any black athletes off his team, or not renew their scholarships, if they refused to participate in the New York Athletic Club meet in February of 1968. A. Yes, he did.

Interrogatory No. 19: If you have answered the preceding question in the affirmative, please state [519] whether or not you passed such information on to Mr. Peter Axthelm, Sports Editor for *Newsweek* prior to July 1, 1968. A. I wasn't the sole source of passing it on; I think there was Harry, myself, Lee Evans, Tommy Smith, all of us that had gotten that same piece of infor-

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mation somewhere along the line must have mentioned it or did mention it to Pete.

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Interrogatory No. 21: After the Brigham Young University track meet in February of 1968, did you have occasion to talk with Mr. Peter Axthelm about the situation of the black athletes on the University of Texas at El Paso track team? If your answer is in the affirmative, please state the substance of what you told Mr. Axthelm in this regard. A. Everybody has a stringer. Every magazine has stringers. Some have more elaborate than others, and basically that is the function I served in this particular feature article, was a stringer, gathering information. [520] Pete and I talked several times and we must have talked during that period of time, too. For me to go back and recollect the period of time, since the date is being given, as I say, it would be hard to say. But, undoubtedly, if it was during that time before the article came out, yes, indeed we did talk at that time about the teams and the fellows on the team, and the team we were talking about is Texas at El Paso.

Interrogatory No. 22: Please state, if you know, whether you are one of the sources upon whom Peter Axthelm relied for information contained in the paragraph of said *Newsweek* article quoted in Question No. 10 above. A. Yes, I am.

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Cross-interrogatories by Vandenburg

* * *

[521] Cross-Interrogatory No. 4: State specifically which information which appeared in the paragraph quoted in Direct Interrogatory No. 10 you furnished or supplied to Mr. Axthelm. [522] A. That's concerning the—as I say, the word "threatened", concerning Vandenburg's dismissing the brothers—dropping the brothers from—excuse me, making the brothers compete at the New York AC track meet.

Yeah, I furnished that. You know, I'm one of the sources. I imagine a couple of other people are the sources, too, because you usually don't go along with one source; you go along with several sources that check things out.

* * *

[525] Cross-Interrogatory No. 10: If you answer to Direct Interrogatory No. 18 is in the affirmative, state whether or not the advice given to you by Mr. Harry Edwards furnished any part of the knowledge or information which you in turn passed on to Mr. Peter Axthelm, Sports Editor of *Newsweek* Magazine.

(Direct Interrogatory No. 18 reread to the witness.) A. Yes; as I have stated before.

* * *

[526] Cross-Interrogatory No. 12: State to the best of your ability the exact words, or writing, if it was in writing, by which you furnished to Mr. Peter Axthelm the information referred to in Direct Interrogatory No. 19.

Appendix F

SKINNER, DEP.

(Direct Interrogatory No. 19 reread to the witness.)

A. The best I can remember is that I said to Pete, relative to that situation, was, you know, "I talked to Bob Beamon the night before and the brothers had indicated and said that the man had kicked him off the squad."

And Axthelm, I think, was saying to me something like: What are you talking about "the man"?

And I said, "Coach Wayne Vandenburg." And that was basically the way I communicated it to him.

And, you know, we went into many things about that, many things about other things relating to information concerning black athletes. We kind of jumped, hit here and there you know, on the conversation. Like all our conversations were like that, you know. I gave him, first of all, things that he required, and then other things I'd gathered.

* * *

Appendix F

VERSCHOTH, DEP.

EXTRACT FROM THE DEPOSITION OF ANITA VERSCHOTH

Direct Interrogatories by Newsweek

* * *

[577] Q8. Are you acquainted with Mr. Peter Axthelm and, if so, please state the nature of your acquaintanceship and for what period of time have you known him? A. Yes. I have known him for two years. Two years ago he was the track writer for Sports Illustrated and I worked as a reporter and researcher on the track meets he covered throughout that whole summer. Since he has left and gone to Newsweek. Since Mr. Axthelm became editor of Newsweek, he gave me certain assignments.

Q9. Please state whether on or about May 31, 1968, you were assigned to cover an invitational track meet in San Diego, California. A. Yes.

Q10. If you answered the foregoing question in the affirmative, then please answer the following questions: (a) At the time of such meet, did you have a discussion with Coach Wayne Vandenburg, Mr. Bud Winter and Mr. Jim Dunaway? If your answer is in the affirmative, please state where such discussion took place, the general subject matter of the discussion and the purpose of having the discussion or [578] conference. A. Yes. I think the place was the Town and Country Motel, in the dining room, for dinner. It was [not]* long after the Black athletes had been barred from the team, so we were naturally talking about

*Corrected by witness as per letter to court reporter printed at p. 591 of Appendix to record in Court of Appeals.

that. It was a very informal discussion; not really a conference.

Q10. (b) If you have answered the foregoing question in the affirmative, then please state whether or not you discussed with Coach Wayne Vandenburg the question of whether those Black athletes on his track team who refused to participate in the Brigham Young University Track Meet of April 1968 would be allowed to return to the track team and have their scholarships renewed. A. Yes.

Q10. (c) Please state the substance of what Coach Wayne Vandenburg told you regarding the Black athletes on his track team who had refused to participate in said Brigham Young University Track Meet of April 1968. A. He said their scholarships would not be renewed. He said they would be permanently suspended.

Q10. (d) Did Coach Wayne Vandenburg admit that he had permanently suspended from the track squad at the University of Texas at El Paso those Black athletes who had refused to participate in the Brigham Young University Track Meet held in April of 1968? A. Yes.

Q11. At the time of your coverage of the invitational track meet in San Diego, did you have occasion to talk with Bob Beamon? If your answer is in the affirmative, please state approximately when and where such discussion took place. [579] A. Yes. It was over breakfast in the coffee shop the next morning. I believe it is a coffee shop called Hanalei. It is at the Hotel Circle at San Diego. It is a Hawaiian-type hotel.

Q12. Please state, to the best of your recollection, what, if anything, Bob Beamon said to you regarding the Black athletes who were members or former members of the track

Appendix F

team at the University of Texas at El Paso. A. The trouble was that Beamon really hardly said anything, so I can't really remember one sentence he said. He doesn't talk much, anyway. In general, he confirmed that he had not known until just recently that the suspension was final. He had been under the impression for quite a while that they all would be reinstated within a year.

Q13. During your coverage of the San Diego Invitational Track Meet, did you interview any other member of the track team from the University of Texas at El Paso and, if so, please state whom you interviewed. A. Yes, I did one, and that was Robert Bethea, also a long jumper like Beamon. Most of the information I have in my file I got from Bethea, and Beamon would nod in agreement with what Bethea said.

Q14. Please state whether or not, on or about June 4, 1968, you sent a dispatch to the sports editor of *Newsweek* magazine. A. Yes.

Q15. Can you identify the document attached hereto as Exhibit A, and, if your answer is in the affirmative, please proceed to explain what it is. A. Yes. I was in San Diego doing a story on Lee [580] Evans, a runner from San Jose State, and after I was through with that, in my file I just thought I would add for Mr. Axthelm's information the things I had heard about the boycott in El Paso, because I thought he might be interested in it, but it was something I had not been assigned to do.

Q16. Please state whether or not in preparing the dispatch, a copy of which is marked Exhibit A and attached hereto, you interviewed many of the athletes and coaches therein referred to. A. Yes.

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VERSCHOTH, DEP.

Q17. Please state whether or not, in your opinion, the statements contained in the dispatch, a copy of which is attached hereto as Exhibit A, are true. A. Yes, in my opinion.

Q18. Please state whether or not you are familiar with the article published in the July 15, 1968, issue of *Newsweek* magazine, entitled "The Angry Black Athlete" and, particularly, the following paragraph thereof:

> "At El Paso, track Coach Wayne Vandenburg threatened to kick six athletes off the team if they joined the boycott of the New York Athletic Club indoor meet in February. The club was charged with discriminatory membership policies. Vandenburg won and the athletes competed. But two months later, after a talk with Harry Edwards, the same athletes refused to enter a meet at Brigham Young University in Utah because of Mormon doctrines about blacks. Vandenburg promptly dropped champion long-jumper Bob Beamon and five others from the squad."

[581] A. Yes.

Q19. Please state whether or not, from your interviews with Coach Wayne Vandenburg and members of his track team, you believe the facts stated in the foregoing article are true. A. The first part of this, where it says "Vandenburg threatened to kick six athletes off the team if they joined the boycott of the New York Athletic Club," I don't know at all. I never asked anybody whether that was true, although I could imagine that Vandenburg threatened them; it wouldn't surprise me. The rest of it I believe to be true.

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VERSCHOTH, DEP.

Q20. If you have knowledge of any other information bearing upon the truth or falsity of the matters set forth in that paragraph of the *Newsweek* article quoted in question No. 18 above, which has not been previously elicited from you in the foregoing questions, please state such information here. A. I think he dropped more than six athletes, by the way. My file states that he dropped, I believe 12 or something like that, and that is what I rather believe, that it was more than six.

Appendix F

VERSCHOTH DISPATCH

EXTRACT FROM THE DISPATCH OF ANITA VERSCHOTH

To NEWSWEEK, JUNE 4, 1968

[593] SANTA MONICA CALIF JUNE 4
PETE AXTHELM NEWSWEEK
I 444 MADISON AVE NYK

RE: THE CHAMPIONS TRACK MEET AT SAN DIEGO

* * *

[603] ON BEAMON: HIS PRESENT RELATIONSHIP WITH COACH WAYNE VANDENBURG IS A MESS. VANDENBURG CLAIMS THERE WAS NO REASON FOR THE TWELVE NEGRO ATHLETES ON HIS TEAM TO BOYCOTT THE BYU MEET, BECAUSE IT TOOK PLACE TEN DAYS AFTER MARTIN LUTHER KINGS ASSASSINATION. HE SAYS YOU HAVE TO HAVE DISCIPLINE. CAN'T LET THE ATHLETES RUN YOUR TRACK PROGRAM. THEY DID NOT EVEN COME TO ME TO TELL ME THAT THEY WANTED TO BOYCOTT. I LEARNED IT FROM THE NEWS MEDIA. BEAMON AT FIRST BELIEVED THAT HE WAS SUSPENDED FOR ONE YEAR ONLY. BUT VANDENBURG SAYS, THE SUSPENSION IS FINAL. THEIR SCHOLARSHIPS WILL BE NOT BE RENEWED NEXT YEAR. HE SAYS THAT BEAMON WAS THE MAIN INSTI-

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VERSCHOTH DISPATCH

GATOR. HE ALSO COMPLAINED TO ME THAT HIS WIFE DID NOT HAVE A GOOD JOB, WHILE SHE WAS WORKING AS AN ACCOUNTANT MAKING THREE HUNDRED DOLLARS A MONTH. BEAMON SAYS HIS WIFE, ALTHOUGH SHE IS A SECRETARY WORKS IN A WAREHOUSE LIFTING HEAVY BOXES FOR ONE DOLLAR THIRTY AN HOUR. BEFORE I CAME TO TEXAS UNIVERSITY, HE SAYS I WAS PROMISED [604] THAT SHE WOULD GET A DECENT JOB. VANDENBURG CRITICIZES BEAMON FOR DRIVING A BIG FORD AND HAVING TWO TELEVISION SETS AS WELL AS AN EXPENSIVE STERO SET. BEAMON SAYS HE AND HIS WIFE CAN BARELY EAT, AND ALL THEY OWN HAS BEEN PAID FOR BY HIS GRANDMOTHER. BEAMON SAYS THEY TOLD VANDENBURG THAT THEY WANTED TO BOYCOTT THE MEET AT THE MORMON UNIVERSITY ONE MONTH BEFORE THE MEET. THEY WENT TO THE TEXAS RELAYS TWO DAYS AFTER THE ASSASSINATION, BUT DECIDED TO TAKE OFF FOR A WEEK OF MOURNING AFTER THAT, WHICH CONVENIENTLY COINCIDED WITH THE MEET. TWO NEGROES ON THE TEAM DID NOT BOYCOTT, BECAUSE THEY ARE FROM THE BAHAMAS AND NOT U. S. CITIZENS.

VANDENBURG SAYS THERE WAS SOME PRESSURE PUT ON ME AFTER I SUSPENDED THEM. I WAS SUPPOSED TO BE FIRED UPON

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VERSCHOTH DISPATCH

THE RECOMMENDATION OF SOME FACULTY MEMBERS. I AM NOT GOING BACK ON MY WORD, AND WE WON'T HAVE ANY MORE BOYCOTTS LIKE THIS, NOT AS I ONG AS I AM THERE. BEAMON SAYS HE AND THE OTHER PROTESTERS TALKED WITH THE ATHLETIC DIRECTOR WHO SAID, HE WOULD REALLY LIKE TO SEE THEM REINSTATED, BUT HE COULD NOT GO BACK ON HIS WORD EITHER. IT WOULD LOOK BAD IN PUBLIC. BEAMON SAYS HE WILL STAY AT TEXAS UNIVERSITY, BECAUSE HE IS GETTING A GOOD EDUCATION IN SPEECH AND EDUCATION, EVEN IF IT MEANT FINDING [605] A JOB FOR HIMSELF NEXT YEAR. HE DENIED THAT THERE IS ANY TRUTH TO THE RUMOUR THAT HE MAY TRY FOR A BASKETBALL SCHOLARSHIP AT TEXAS UNIVERSITY OR TRANSFER TO SAN JOSE STATE. VANDENBURG SAYS HE WOULD NOT GET A BASKETBALL SCHOLARSHIP ANYWAY. BUD WINTER SAYS HE DOES NOT WANT HIM AT SAN JOSE STATE. BEAMON CLAIMS HE STILL WORKS OUT AT THE SCHOOL TRACK, BUT VANDENBURG SAYS THAT THE SUSPENDED ATHLETES ARE NOT ALLOWED TO WORK OUT THERE AND THAT HE HAS NOT SEEN BEAMON TRAIN LATELY. BEAMON SAYS HE WORKS OUT EARLY IN THE MORNINGS WHEN NOBODY ELSE IS THERE. BEAMON'S TEAMMATE, LONG JUMPER ROBERT BETHEA, WHO

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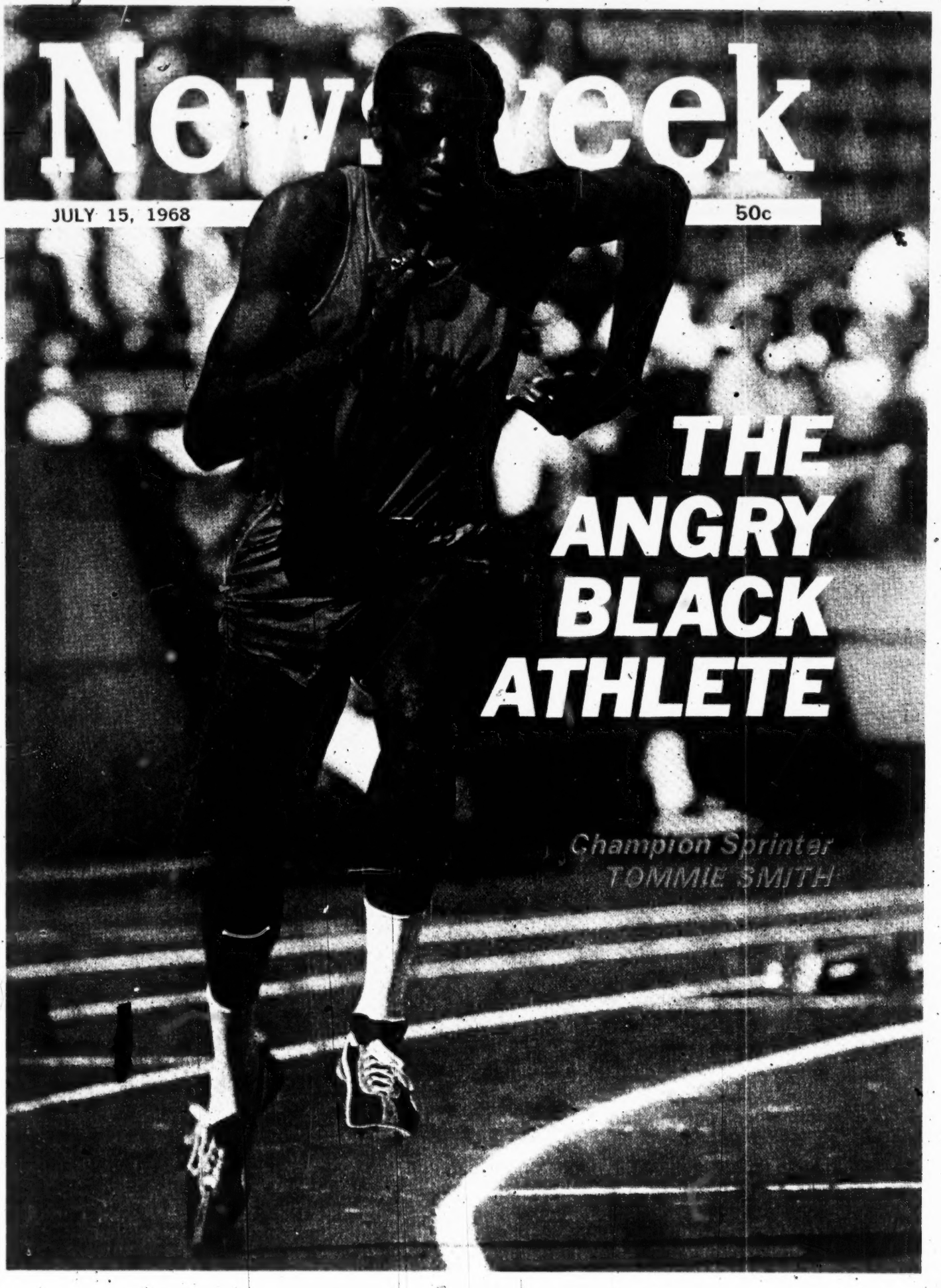
VERSCHOTH DISPATCH

WAS ALSO SUSPENDED, SAYS VANDENBURG WOULD HAVE HAD A FINE MILE RELAY TEAM THIS SEASON, IF HE HAD NOT EXCLUDED THEM FROM THE TEAM. WE REALLY WOULD LIKE TO BE REINSTATED, HE SAYS BUT I GUESS WE'LL HAVE TO MAKE DO WITHOUT A SCHOLARSHIP NEXT YEAR. WE WOULD LOSE A LOT OF UNITS IF WE TRANSFERRED TO ANOTHER SCHOOL.

* * *

[606] ANITA VERSCHOTH.

1212AEDT.



APPENDIX G

The Newsweek Article

Top of the Week

Axthelm and Smith at the Olympic trials

The Angry Black Athlete PAGE 56

The black college athlete is an angry young man. No longer willing to buy the argument that sport has been "good" to the Negro, he is striking out at the white sports establishment. And as the Olympic Games draw close, such militants as champion sprinter Tommie Smith of San Jose are planning how—probably short of an actual boycott—to make their protest felt. Aided by bureau reports, Newsweek Sports editor **Pete Axthelm** tells the story of this growing mood of militancy—a movement powered by everyone from basketball stars to some of the nation's leading trackmen, many of whom are pictured in four pages of color photographs at last week's troubled Olympic trials. (Newsweek cover photo by Neil Leifer.)

The Guns of July PAGE 21

Bursts of gunfire abruptly drowned out the shouts of playing children one humid morning last week in New York City's Central Park, and suddenly another of those meaningless lethal paroxysms was exploding in the face of a nation needing no reminder of its violent propensities. Before the shooting stopped, two lay dead and three wounded, and once again the President implored Congress to enact stricter gun controls. General Editor **Peter Goldman** wrote the story of this and other shock waves in a week of private violence.

'The Impulse Toward a Safer World' PAGE 33

Presiding over the signing of a treaty co-sponsored by Britain, the U.S. and the Soviet Union and designed to halt the spread of nuclear weapons, President Johnson declared that the pact "keeps active the impulse toward a safer world." He then announced that Washington and Moscow had agreed to talk about limiting their own vast nuclear arsenals. From reports by Newsweek bureaus in Washington, Moscow and London, Associate Editor **Raymond Carroll** describes the diplomatic events that one day may be viewed as a major step toward nuclear disarmament, while General Editor **Angus Cloming** examines the motives that are bringing the superpowers to the disarmament table.

The Market: Too Much of a Good Thing? PAGE 65

Behind the glittering Wall Street picture of fantastic profits lies the reality of an industry deluged to the point of chaos by its own success. The stormy transition that troubles the securities industry, and the steps being taken by Wall Street and the SEC to meet changing conditions, are examined by Associate Editor **Rich Thomas** in this week's Spotlight on Business.

Newsweek

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(Kenneth Crawford is on vacation; his column will resume on his return.)

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Jeff Krobt

The San Jose sprinters: Power and protest in Speed City*

THE ANGRY BLACK ATHLETE

High in the Los Angeles Coliseum stands, Tommie Smith stood in a huddle of friends, looking down toward the field where last week's Olympic trials were dragging to a close. Smith, the San Jose, Calif., sprinter who holds ten world records, had just won a 200-meter dash that was one of the most important of his life. As a leader of the proposed black boycott of the Olympics, he knew that a defeat in the trials would have pleased many of his detractors and taken some edge off his protests. A radioman thrust a long microphone toward Smith and began, "Tommie, you ran with real power out there . . ."

"Call it *black* power," said Smith. End of interview. If the exchange was abrupt, it only mirrored the intense dedication of the 23-year-old athlete. An education major at San Jose State, the articulate senior is in the vanguard of an angry movement that has disrupted the calm façade of U.S. amateur athletics. On 35 college campuses in the past year, Negro athletes have stunned coaches and administrators with sweeping demands for change. They want black coaches, black trainers, black cheerleaders—and new black dignity.

This October the United States is likely to lose the Olympic basketball title for the first time because Lew Alcindor of the University of California at Los Angeles and other black stars boycotted the trials. Equally militant are many outstanding trackmen. They plan some form of dramatic protest—if not an outright boycott—at the Mexico City Games. For the militant Negro college athlete, talent on the playing field has become a means toward an ideological end: nothing less than an attack on racial injustice in American life.

In a sense, white society has created black athletic power. The explanation for black pre-eminence in sport is social, not scientific. The Negro does not have more muscles; he has fewer opportunities. A talented white boy can often decide whether to channel his various abilities into business, a profession or a sport. A talented black is rarely exposed to the first two choices, so he works that much harder to run, jump or throw better than anyone else. In American track and field, Negroes excel mainly in sprints and jumping events. The reason is not physiological and not, as one champion white pole vaulter has guessed, "because distance running and vaulting are too much work for them." Sprinter John Carlos of San Jose offers a simple explanation: "Everything is hustle and bustle for a young black. Run to the bus, run with other kids, run from the cops. Maybe that's how we get so good at sprinting." In any case, black athletes dominate enough events to make anti-boycott Olympians shudder.

Bewilderment: Older Negro sports figures—including assistant Olympic coach Stan Wright, track hero Jesse Owens and San Francisco center fielder Willie Mays—insist that sports have been good to the Negro and should not be a target for militants. Whites have reacted to the black athletes' demands with bewilderment. "I feel it's outside influences trying to use Negro athletes," says UCLA basketball coach John Wooden, who has maintained peace on his own team by allowing Alcindor and his black teammates to express their racial pride openly in "natural" haircuts, dress and attitude.

But the black athlete is an angry young man suddenly aware of years of exploitation and discrimination; he is not attuned to the cautious pronouncements of those who tell him that "sports have done so much for you." The message that reaches him today is the one preached by Harry Edwards, the 6-foot 8-inch ex-professor of sociology at San Jose State. A former top-class performer in track, basketball and football, Edwards is the driving figure behind the movement. "Athletes are on the field maybe four hours a day," says the 25-year-old sociologist. "The rest of the time, they're in the same garbage heap that most of the black people in this society live in. But they have access at a moment's notice to the mass media. Black athletes must take a stand."

Rhetoric: On the eve of the Olympic trials, more than 40 black athletes attended a closed meeting with Edwards at the competitors' quarters in Pomona, Calif. As they convened, the boycott movement seemed to be on the wane, largely because the International Olympic Committee had submitted to pressure last spring and barred South Africa from the games. In his most impassioned rhetoric, Edwards reminded the athletes that South Africa had never been a major target of the boycott: "The point has always been to dramatize racial injustice right here at home." After a discussion, the athletes voted decisively in favor of keeping the Olympic protest movement alive. A number also pledged to refuse to mount victory stands, accept awards or join the traditional march from the Coliseum at the climax of the trials.

The Olympic Committee reacted with a series of defensive moves. On the second day of the trials—the day boycott leaders such as Smith and Carlos were to run—the award stands were removed and victory ceremonies canceled. The march from the stadium was also abandoned. And in the most ironic action, nervous committee officials decided before the meet that the Olympic trials would not be trials at all.

Innovation: Previous trials have been thrilling sudden-death affairs: the first three finishers in each event made the U.S. team and only a few injured stars have ever been granted a second chance. Last week it didn't matter if a man ran first or eighth in a final; he could still be taken to South Lake Tahoe, Calif., for further tryouts this summer.

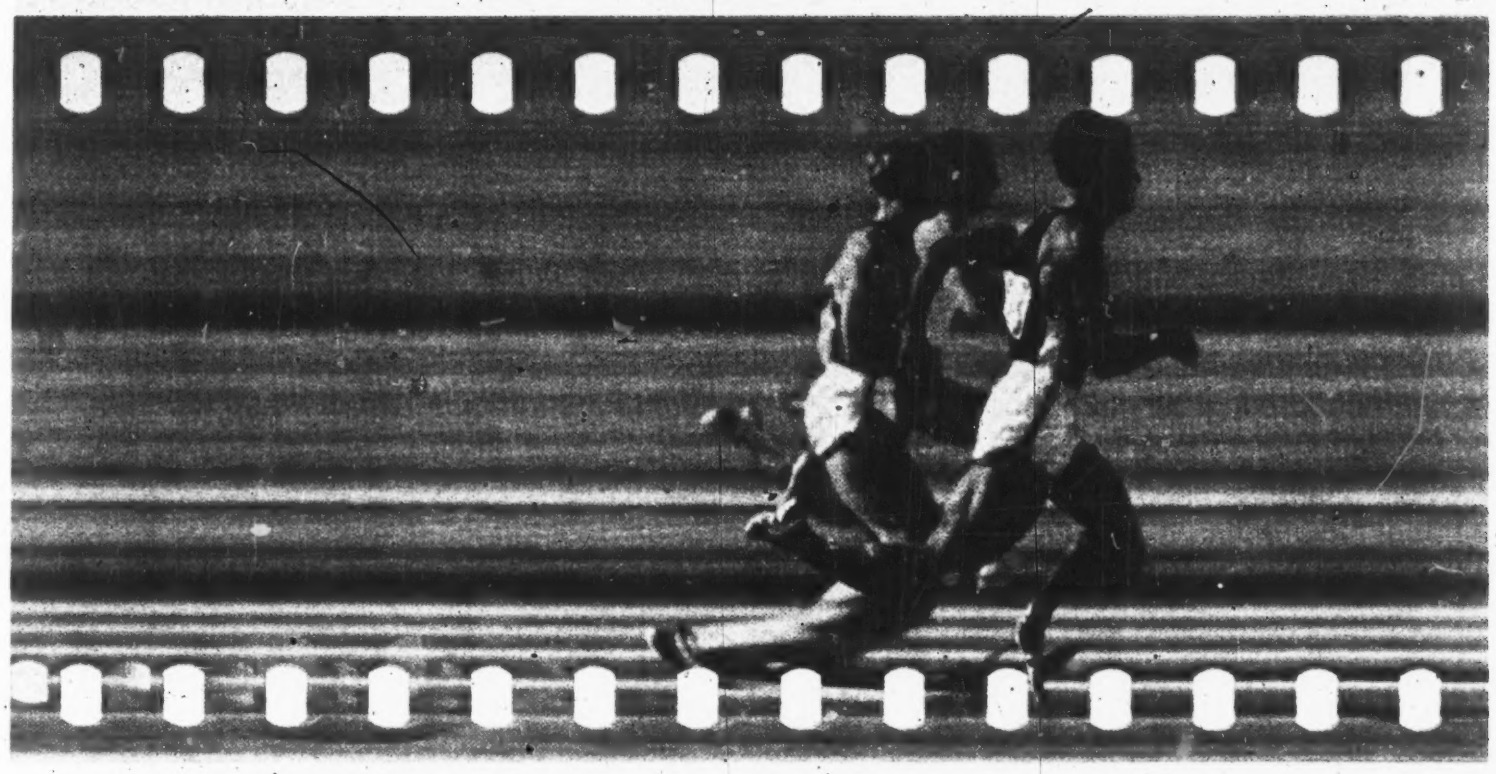
The innovation was adopted partly to test competitors in high altitudes (South Lake Tahoe's elevation: 7,377 feet) before taking them to Mexico City, and partly to accommodate an unusual number of ailing stars, headed by Kansas miler Jim Ryun. But as the meet pro-

Determined Lee Evans (right) leads the pack in Olympic trial heat on the way to his third straight major 400-meter victory

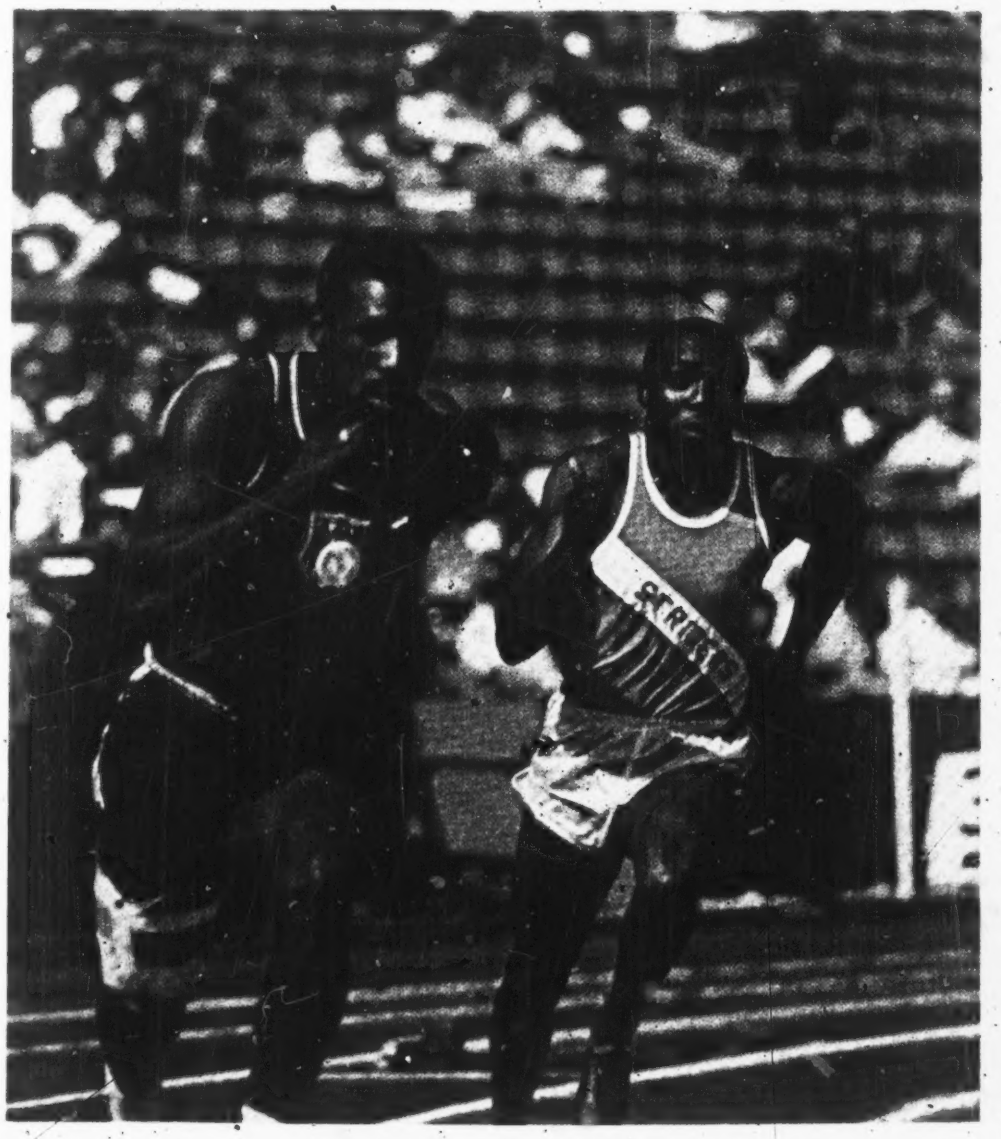
*Top, left to right: Kirk Clayton; Jerry Williams, Sam Davis, Bill Gaines, Lee Evans, Bob Griffin, Frank Slayton; bottom: Tommie Smith, Ronnie Ray Smith, John Carlos.

Appendix G

THE NEWSWEEK ARTICLE

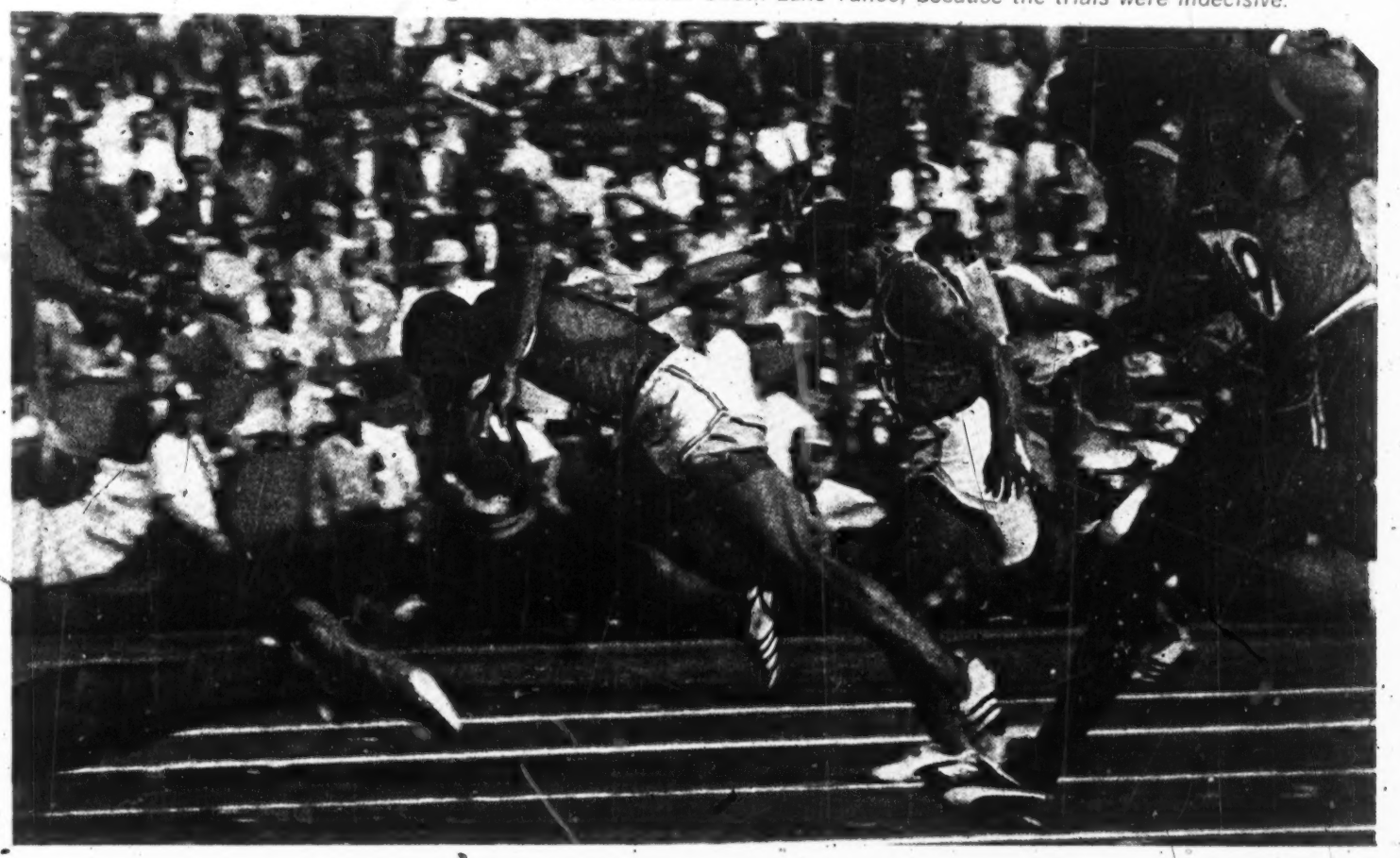


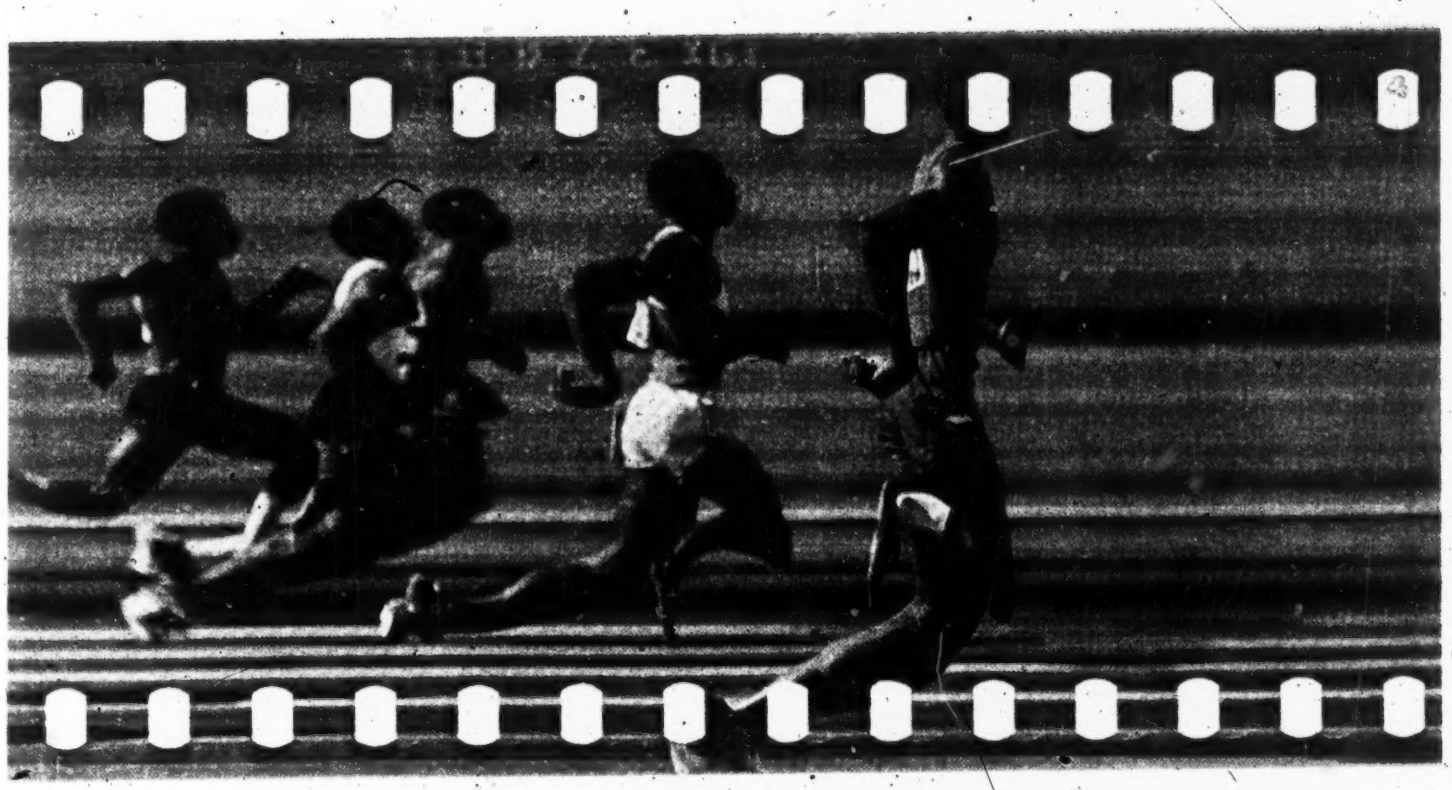
Photographed for Newsweek by Neil Leifer



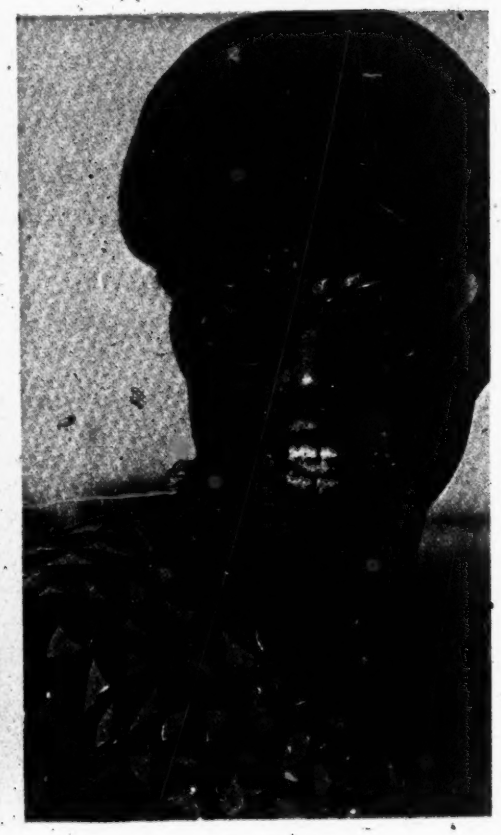
Black power at the Olympic trials: Bearded John Carlos (left) wears protest button over his AAU insignia as he races Jim Hines around turn in a 200-meter race on the Los Angeles Coliseum track. In the stands, young blacks gather in a 'poor people's section' to cheer for their 'brothers' and display angry placards.

Hurdler Earl McCullouch fell and finished seventh in last week's trials; sprinter Charlie Greene (below) lunged but lost. Both will get another chance at South Lake Tahoe, because the trials were indecisive.





Wide-angle photo-finish camera catches Tommie Smith (above, right) leading in 200-meter final. Long-jumper Jerry Proctor (left) soars against background of flags and Olympic symbols. Boycott leader Harry Edwards (below) sets the pace at the trials.



gressed, it became clear that it was mainly a protection against boycotters. By taking only the leaders in each event, the committee would have been left with an almost all-black squad in seven of the eighteen events—putting it at the mercy of a subsequent boycott. Therefore as many as twelve men from each event will be at Tahoe, making last week's trials virtually meaningless.

Victory: For Harry Edwards, who attended the meet with Boston Celtics' player-coach Bill Russell and a host of black followers in the "poor people's section" of $3 general-admission seats, it was a considerable victory. "Now that so many brothers have awakened," he said, "there's nothing we can't accomplish."

For crusty members of the U.S. Olympic establishment, Edwards's movement is close to treason. "It seems a little ungrateful to attempt to boycott something which has given them such great opportunity," said Avery Brundage, president of the International Olympic Committee. Most white sport fans share his dismay. Why, they ask, can't those kids be grateful? Black athletes are getting free educations, big pro contracts, fame; sport gives them a chance to rise in society. Sure, there's a racial problem. But of all Negroes, reason many whites, the athlete has the least to complain about. Why can't he be a credit to his race like Jesse Owens?

Jesse Owens, at 55, says he is still grateful to sports. Yet two years after he won four gold medals at the 1936 Berlin Olympics, he was reduced to racing against horses and motorcycles in order to eat. Other blacks have found Olympic medals of dubious value in white society. "With my gold medal actually hanging from my neck," says heavyweight boxing champion Muhammad Ali, "I couldn't get a cheeseburger served to me in a downtown Louisville restaurant in 1960."

Baseball points proudly to Jackie Robinson's entrance into the big leagues in 1947; Robinson now supports the Olympic boycott. Remember Levi Jackson, the swift halfback who rose to be captain of the 1949 Yale football team? "I was on cloud nine," he recalled recently. "Now, thinking back on those good old college days, maybe they weren't so good after all. There were places I couldn't go, things I couldn't do even as captain. In a way I was only 50 per cent a part of the group."

Ill-Prepared: Today young athletes wonder how some of their elders managed to keep their cool. It is hard to remain calm when your free education runs out at the same time as your sports eligibility. Most blacks are still far from graduation when their playing careers end because they were ill-prepared when recruited and received no special counseling or encouragement once classes began. Indeed, astonishingly few black athletes graduate with their classes and few can ever afford to pay their way onward toward a diploma. The Texas Western basketball team won the 1966 NCAA championship with five black starters. Not one of them has graduated yet—and they are far from unusual.

If the athlete does graduate, he often faces more employment problems than other college-educated blacks: "If I had gotten a degree at East Texas State," says John Carlos, who transferred to San Jose State last January, "I would have had the great privilege of walking into a white man's office and failing the first job test he gave me. They made it clear that I was at school to run, not to worry about learning."

For a black youth recruited from the ghetto or a rural slum, life in a predominantly white college can be strange and bitterly lonely. He may face discrimination in housing, fraternities or the community, and he usually faces it without the aid of a black coach or counselor.

Malcolm W. Emmons

Calvin Murphy: 'I am two people'

At UCLA, which is situated in the plush Westwood area, black athletes constantly have trouble finding off-campus housing. Ron Copeland, a top UCLA hurdler and football player, recalls his search for an apartment: "There would be a 'For Rent' sign out on an apartment, and I would go up and ask about it and they would say, 'Oh, I just rented it.' Then I would go around the corner, put a dime in the phone and call up and they would say, 'Oh yes. Come on up. It's still for rent'."

If the Negro does manage to break into white social life, he is told by coaches that he should not date white girls. In addition, he is subjected to countless small indignities, including a not inconsiderable number of coaches who have trouble pronouncing the word "Negro." "Whenever I get ready to say the word," admits UCLA football coach Tommy Prothro, "I think of my knee and then say it." In a conversation with NEWSWEEK's Nolan Davis recently, Prothro began by carefully referring to "Negroes," and later slipped back into "Nigras." Prothro is more industrious about facing the word problem than many. Former Stanford runner Ted Spearman says that he quit the track team when he overheard coach Payton Jordan, now the head Olympic coach, using the phrase "nigger in the woodpile."

Calvin Murphy, the sensational sophomore basketball player at Niagara, told NEWSWEEK Assistant Editor Johnathan Rodgers of the painful impressions of a black athlete walking into white college life: "I was coming out of the streets into another world. I got angry when I saw people staring at me. First I thought it was because there was a Negro on campus. Then I began to think they were saying, 'There's Calvin Murphy, the basketball player.' That sounds much better. But I didn't just feel lost—I felt like I wanted to get lost. With the few other brothers on campus I was fine. But when I had to walk alone among *those people*, I felt like . . . ugh . . . You know a lot of times we'd be kidding in the dorms and I'd find that the guys couldn't understand my humor. I would talk my jive talk and they wouldn't understand. So I had to act differently than I do at home. I am two people. I like the one at home better."

Aggravating: How could things be improved for him at the Catholic university in upstate New York? "The first way is for them to stop calling me *boy*!" said Murphy. "The guys in the dorms—even the priests—call me this and don't realize what they are saying. To me it's worse than being called nigger. When a priest calls you boy and you explain nicely that you don't like it, and he does it again, this is aggravating. The second time I don't explain it so nicely. They also go around saying 'you people.' What kind of mess is this?"

It is a mess that extends from Niagara to the University of California, from Michigan State to the University of Texas at El Paso. Sometimes the racial issue is inflamed by a coach's get-tough policy. "I could give in to a lot of Negro demands," says one Southwestern track coach, "and keep my team intact. But someone has to hold the line against these people."

At El Paso, track coach Wayne Vandenburg threatened to kick six athletes off the team if they joined the boycott of the New York Athletic Club indoor meet in February. The club was charged with discriminatory membership policies. Vandenburg won and the athletes competed. But two months later, after a talk with Harry Edwards, the same athletes refused to enter a meet at Brigham Young University in Utah because of Mormon doctrines about blacks. Vandenburg promptly dropped champion long-jumper Bob Beamon and five others from the squad.

At many colleges, coaches have been more pliable—or at least willing to consider black demands. Yet they find it hard to conceal their distress about the

new mood. For example, blacks are no longer willing to follow every instruction, right or wrong. "Twenty years ago you didn't just walk up to a coach and tell him how you felt about things," explains Benjamin Bluitt, 44, a former Negro star and now basketball coach at Farragut High School in Chicago. "We pouted a little, but that's about all. I think there was some feeling that Negroes had to prove they could 'take it.' But the kids today don't feel they have to go through the same stuff. We took it for them."

White Boy: "The white coach is nothing but a grown-up white boy," adds Dale Rubin, who starred in track and football at McClymonds High in Oakland. "And when you talk about communication with white boys, you're talking about *no* willingness to understand." Now a law student at the University of California, Rubin vividly recalls a track awards luncheon at Stanford where Payton Jordan introduced him as the "court jester" of the squad because he kept the runners loose with quips and clowning on buses. "That shows the impression the man had of me," says Rubin. "I was expected to laugh and grin, so I was the jester. Jordan never wondered what was really going on in my mind."

Few whites bothered to probe the mind of 6-foot 11-inch basketball star Bob Presley either—until the entire sports program at the University of California had been threatened. Presley, a product of a ghetto on the north side of Detroit, attended four local high schools and never graduated. Then, after moving to California, he went to two other high schools and junior college. Berkeley took him under a regulation which allows colleges to assign 2 per cent of their openings each year to students with low grades but high potential. The rule has been widely praised by admissions boards but some observers charge that it is too often applied to athletes.

Hired Hand: Presley happened to be bright enough to adjust to the scholastic standards at Berkeley. But his background had not prepared him as well for the social situation at a huge, bustling predominantly white university. A loner to begin with, he chose to fraternize almost solely with other black team members and gave the impression of coldly ignoring the whites, including coach Rene Herrerias. The whites, in turn, seemed to look on Presley as a talented hired hand who was there to play ball, not to think or take part in everyday college life.

Early last season, Presley moved into the nation's top ten in rebounding, but he never felt comfortable in his starring role. At two road games, students in the gyms taunted him by jumping around imitating apes. At practices, he grew wary of coach Herrerias's strategy. "When certain guys got the ball," Presley said, "it was time to shoot. When a brother got the ball, it was time to set up a play." Herrerias, who had little prior experience with blacks, never did reach

Owens: Grateful hero

UPI

Robinson: Daring pioneer

UPI

Ali: Vocal champion

his star. The explosion finally came over a small matter—Herrerias ordered Presley to give up his natural haircut; Presley refused. When he missed a practice session a few days later, he was kicked off the team.

Other black athletes rallied behind him and presented the university with a list of demands, including the hiring of black coaches. An advisory committee studied the matter, and Herrerias and athletic director Pete Newell later resigned. Jim Padgett, 36, the white freshman coach who was popular with both blacks and whites, was named head coach and Earl Robinson, a Negro, became his assistant.

Coach: Black football players at Berkeley anticipated similar treatment; when it didn't materialize, they walked out and spring practice ended with an all-white intrasquad game. The pressure won again: Negro John Erby was appointed assistant football coach—and the blacks returned. "We are counting," said black leader Irby Augustine, a defensive end, "on further significant changes in the fall." Presley, the man who started it all, has become something of a campus hero, and his grades have risen sharply.

Other athletes have proven just as unified and determined as those at Berkeley. Last week 23 of the 25 Iowa State black athletes announced that they would withdraw from school Aug. 1 because the athletic council rejected some of their eight demands, including one for the hiring of Negro coaches in all sports. And Michigan State—where Duffy Daugherty has built a reputation as the master recruiter and "handler" of Negroes, where big-time football and Negroes have become almost synonymous—was stunned to find it had racial troubles, too.

No Encouragement: Michigan State blacks, like those at many other schools, had no specific grievances against coaches; Daugherty is popular with the football players. Other, subtler things were involved. "The most humiliating thing about my career," says one former MSU All-American, "was to play my heart out and not even have a black cheerleader to encourage me. A half hour after the game you were just another black boy walking down Grand River, so that everybody could ignore you." The blacks, led by halfback La Marr Thomas, approached athletic director Biggie Munn this spring with proposals for black cheerleaders, assistant coaches, counselors and trainers. Munn scanned the list, chuckled and began crossing out the demands one by one.

"That really knocked us out," says one athlete. "Then Munn smiled and said, 'Ho, ho, I guess you want a black ticket manager or something.' I decided right there that I wasn't going to be his little black pet anymore." The football players pulled a one-day strike at spring practice and returned after some of their demands were met. But the matter is not concluded. Negroes are planning a mas-

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Appendix G
THE NEWSWEEK ARTICLE

sive Black Athletic Power Conference for the fall, inviting participants from throughout the Big Ten.

The black movement in sports, which has produced so many protests across the country, could hardly have a less likely focal point than San Jose State College. A collection of characterless buildings sprawling across two campus areas, State has long been a haven for college students with little but partying on their minds. "When I was an undergraduate here," recalls Harry Edwards, "you'd watch the white kids drive their sports cars to school in September and unload their water skis, their stereos, their wardrobes—and maybe one paperback book."

Speed City: Edwards has changed some of that in two years of teaching. His classes in race relations attract hundreds of students. His cluttered office is a center for campus blacks—especially athletes. And the trackmen who have gathered in San Jose happen to make up the most talented group of sprinters ever assembled. Some came because of Edwards; others wanted the coaching aid of Bud Winter, a master of sprint technique. Many were lured personally by quarter-miler Lee Evans and an enthusiastic white track buff named Art Simburg. Smith and Evans may be the best-known runners, but the list goes on and on: John Carlos, Ronnie Ray Smith, Bill Gaines, Kirk Clayton, Jerry Williams, Sam Davis, Frank Slayton and Bob Griffin are all top sprinters.

Some of the runners are competing for San Jose State. Others are attending the school but are ineligible for the college team because they are transfers or fifth-year students; they have been running for the Santa Clara Valley Youth Village—a track club nearby. Among the leaders of the so-called Speed City group, certain themes keep coming up—themes that help explain why the San Jose athletes have been in the forefront of the angry drive that has spread so swiftly in the last year. Three of San Jose's best and most militant:

Fred Kaplan—Black Star

Russell and Edwards: A new kind of laughter

■ **Tommie Smith,** the fastest 220-yard runner of all time. "I came from Texas to California on a migrant-labor bus when I was 6," says Smith. "There were eight children. My father worked as a picker at a labor camp for three years at a dollar an hour before he could pay back our bus fare. I was too busy trying to survive to notice what was happening, and my father was too proud to complain about it. But in high school I started to wake up, and when I got here I looked around and realized that I could still be in that labor camp if I couldn't run fast. People here recognize me as a fast nigger—but that still means a nigger."

Tommie's life is full of things beyond track. He will graduate from San Jose State in January and work toward a master's in education. His intense and intelligent wife Denise, a 19-year-old former world-class track star herself, backs him strongly in all he does. "But nobody sees that I'm a serious student," he says. "That's not my role to the white folks." Denise adds angrily: "I'm the great runner's wife, but if I walk into a store in Saratoga or Campbell, white districts near San Jose, I get too much service. Salespeople surround me as if I'm going to steal. On the street people there stop to look. Maybe they're afraid I'm going to buy a house in the neighborhood."

■ **Lee Evans,** 21, the national champion quarter-miler for three straight years. Evans has put together three strong 400-meter triumphs in recent meets leading toward the Olympics. Why hasn't he been caught up by the excitement of the Games? Partly because after one of those meets he returned home to find that his attractive wife Linda, 18, had been denied a job because of her "natural" hair. "I won't straighten my hair for those devils unless they want to kink their hair for me," Linda snapped.

There was a time when Lee worked in fields near Fresno and never thought of striking back at discrimination: "I picked grapes and brought the sack in to The Man. He'd put his foot under the scale to make it lighter and pay me less—and you know us kids took it. Hell, my high-school coach used to tell 'colored boy' jokes and I'd actually *laugh*. I once wrote an autobiography for a seventh-grade assignment. It said I wanted to join the Army and be a good citizen and all that—just the way the whites want us kids to think. I had to come here before I learned that I've got to be a good black man before I can be anything else."

Lee's running style is unorthodox and tortured, a direct contrast to Tommie's fluid grace. But Lee always seems to catch his man. "The last yards of a quarter-mile are very painful," he explains. "Maybe I can take more pain than some others." He is also known for his ability to "psych" himself for a race. "That comes easy," he says. "One day my brother and I were walking through a sheep field. A guy thought we were stealing his sheep and started shooting at us. I outran my brother and kept on going—and after that, don't think my adrenalin doesn't get going every time I hear the starter's gun." At one low point, Lee's father begged him to quit track and work longer hours. Evans cringes when he recalls how his only escape from poverty could have eluded him. "When you first become aware of the racist system," he said, "you get bitter for a long time. Then you have to act, and we athletes are lucky to have a good form of action."

■ **John Carlos,** 23, among the world's fastest sprinters at both 100 and 220 yards. Carlos broke a record the first time he ran a relay leg at his Harlem high school. Running has always been easy for him, but school came harder. "I was never a very good student," he says, "so when East Texas State offered me a scholarship, I took it even though the coach sounded like a cracker. What a mistake." Carlos asked for tutoring help at the college in Commerce, Texas; it never materialized. His wife Kim was promised a job; after a long delay she was offered one washing dishes. They had been assured of a wholesome country atmosphere for their daughter, now 2½. But the atmosphere was mainly lonely; white families kept their children at a distance.

"In Harlem, you're not brought up to take what they do in Texas," says Carlos. As a small boy, Carlos's main recreation was venturing from 141st Street and Lenox Avenue across the bridge into the Bronx, "so the cops could beat us up and chase us back into our own neighborhood." At 16, he was at Rockaway Beach when some younger white boys asked him and some friends for help in a fight. "A bigger white kid came at me with a broken bottle," he recalls, "and screamed, 'I'm gonna kill you, black boy.' I ran until he threw the bottle, then knocked his teeth out. I was still beating on him underwater when the cops came. That's about all I ever did, fight."

Carlos kept fighting in the Southwest, in restaurants and pool halls that he refused to be barred from because he was black. He also battled East Texas coach

Delmer Brown and tried to organize other athletes. "When Brown gave us brothers a pep talk before one of those Pinocchio meets in one of those funny little towns down there," he says, "It always came out for me like, 'Okay slaves, get that cotton harvest in quick'." Carlos headed for San Jose State in January. "This isn't heaven," he says, "but at least you can be a human being."

Recently Carlos sat on the grass near the San Jose practice track and chatted with coach Winter about some fine performances by Jamaican athletes. "Yeah, coach," Carlos finally said with a wink. "I think Jamaica might win the Olympics. With Italy second. Maybe the U.S. whites will get third." The other sprinters laughed, yet they were forced to admit privately that a boycott then seemed very far away. But after the trials in Los Angeles last week, they were laughing in a different way. "It's unbelievable," said Tommie Smith, "how much momentum we picked up in a few days."

'Just Buttons': A surprising number of blacks arrived at the trials wearing the large "Olympic Project for Human Rights" buttons on their sweatsuits. Sprinters who had previously been uncommitted or firmly opposed to a boycott —including Army Capt. Mel Pender, Houston's Jim Hines and Nebraska's Charlie Greene—upset some officials with the insignia. "They're just buttons," emphasized both Pender and Hines. "They show some sympathy for an idea. They definitely don't mean a boycott."

Greene, who once spoke strongly against the movement, said: "I was misled by newspaper reports that made Harry Edwards sound like some kind of fanatic. Now I've talked to him personally and I'm impressed. I don't think there will be a boycott, but I'm pretty sure something will happen." Among the long jumpers, Beamon and Jerry Proctor remained silent but Olympic veteran Ralph Boston said: "I'm not at all in opposition to what Edwards says. I've been quoted as saying that I *want* to go to the Games—and I do. But if I think it will do any good, I'll stay home." Leading hurdler Earl McCullouch may avoid the dilemma by signing a pro-football contract.

Content to keep the Olympic Committee in doubt, Edwards will prolong the suspense—perhaps until the high-altitude trials end on Sept. 17 or even until Oct. 12, opening day of the Olympics—before announcing definite plans for Mexico City. Last week some blacks mused over possible protests: competing in plain black uniforms, removing U.S. insignia from uniforms, refusing to mount award platforms, marching as a separate group as the U.S. team enters the Games.

No Fun: While boycott talk occupied many athletes, the business of the trials went on. As usual, blacks dominated the running of the 100-, 200- and 400-meter races; then special runoffs were held to select added qualifiers, some of whom turned out to be white. (Ironically, the main "white hope" in the sprints, Arizona State's Jerry Bright, wore an Olympic-project button.) Lacking any importance, most races lost much of their excitement. But as the eight finalists approached the starting blocks for the 200-meter final, a new tension developed.

Carlos, with a slightly injured leg, has difficulty running tight turns on the inside lane; Smith, a competitive runner who likes to run at a target, dislikes the outside because from the staggered start he must run in front of his opponents. The lanes, as always, were drawn from a hat; Carlos drew the inside, Smith the extreme outside. It was unusually bad luck—and Denise Smith saw it as more than luck. As the runners lined up, she raced from her seat to the edge of the field to complain loudly to officials. At the blocks, Carlos walked over and told Tommie, "If I run all out from this lane, I'll pull a muscle again. I'm gonna have to settle for third or fourth. But you can win no matter where they put you. Just blow out of there and show 'em that nothing will stop us."

"A lot of people would love to see me lose," replied Tommie. "But I'll win. I'm really psyched up—I've never been so conscious of running for my people." At the gun, he burst off to one of the fastest starts of his life; then he increased the pace. He came out of the turn floating, his strides effortlessly eating up ground. Head thrown back, knees pumping, he held off the tenacious Hines with ease, broke the tape and jogged to a stop. For a moment he stood still, hands on hips. Then, slowly, he pushed his sunglasses up on his forehead, looked toward the crowd, and raised a fist in triumph.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

STEPHEN FROLING, being duly sworn, deposes and says that he served the foregoing Petition and Appendix upon the attorneys for respondent herein, on May 3, 1971 by mailing three true and correct copies thereof, airmail postage prepaid to Francis C. Broaddus, Jr., Esq., Attorney for Respondent, 525 Southwest Center, El Paso, Texas 79901, and to Burt Williams, Esq., Attorney for Respondent, 707 Southwest Center, El Paso, Texas 79901.

/s/ STEPHEN FROLING
Stephen Froling

Sworn to before me this
3rd day of May, 1971.

.....
Notary Public

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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FILED
JUN 21 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM ~~1970~~ 70— 144

No. ~~1672~~

NEWSWEEK, INC.,

Petitioner,

against

WAYNE VANDENBURG,

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

FRANCIS C. BROADDUS JR.
525 Southwest National Bank Building
El Paso, Texas 79901

BERT WILLIAMS
707 Southwest National Bank Building
El Paso, Texas 79901

GEORGE A. McALMON JR.
508 Southwest National Bank Building
El Paso, Texas 79901

Attorneys for Respondent
Wayne Vandenburg

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IN THE
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OPINIONS BELOW

The District Court for the Western District of Texas, El Paso Division, entered an order denying Petitioner's Motion for Summary Judgment. On appeal from such order the United States Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court and remanded the cause to the District Court for trial. The unreported order and opinion of the District Court is printed as Appendix B (p. 3a) of Petitioner's Brief, and the *per curiam* opinion and judgment of the Court of Appeals are reprinted as Appendices D and E (pp. 9a and 15a) of Petitioner's Brief.

QUESTION PRESENTED

1. Does the record in this case contain sufficient evidence to raise an issue of fact from which a jury could find "actual malice" so as to support the judgment of the Court of Appeals in remanding the cause herein to the District Court for trial.

STATEMENT

This is a libel suit. Newsweek asserts that the District Court erred in failing to grant its Motion for Summary Judgment which alleged that the record as a whole failed to present sufficient evidence to give rise to an issue of fact from which a jury could find "actual malice". The District Court overruled this contention, and, likewise, the Court of Appeals, after a careful review of the record, refuted this argument and remanded the cause for trial in the District Court saying:

> "The two-volume, 650-odd page appendix contains extensive discovery, depositions and affidavits from which the district court might properly have concluded that Newsweek had failed to show that there is no genuine issue as to any material fact".

Both the lower court and the appellate court clearly recognized the issue involved; both were more than adequately familiar with the legal principles related to "actual malice" in libel suits as enunciated by the Supreme Court; and both had full and complete access to the record at hand relating to the fact issue of

malice. Both the District Court and the Court of Appeals afirmatively held that in their view the record contained sufficient facts upon which a jury issue would arise with respect to the existence of "actual malice" on the part of Newsweek in publishing its libelous article. As stated by the Court of Appeals in its opinion:

> "Newsweek does not dispute that there are facts in evidence from which a jury might find some parts of the article false. Its sole contention is that the record as a whole does not present sufficient evidence to give rise to an issue of fact from which a jury could find 'actual malice.'"

ARGUMENT

The strongest arguments in favor of Respondent's position are the opinions of both the District Court and the Court of Appeals. They are both well reasoned, thorough, and strictly to the point in issue; and they both clearly hold that the record is sufficient to establish a fact issue from which a jury could find actual malice on the part of Newsweek.

The petitioner's brief fails to set out clearly the factual background giving rise to this libel suit. Newsweek published as its cover story for its July 15, 1968, issue an article entitled "The Angry Black Athlete", which included pictures, a cover picture in color, and a picture and editorial comment identifying the article as the "lead story" in the magazine. The article pre-

sented an extremely slanted view of mistreatment of black athletes by the white establishment (coaches, university athletic directors, etc.), and it particularly inferred that the plaintiff was a racist, white coach, who exploited black athletes and treated them as inferior beings. The article discussed events related to the plaintiff which had transpired more than five months previously, and no part of the article was "hot news". The Newsweek report of events was entirely contrary to every earlier published account on the subject; it was entirely contrary to a series of articles published simultaneously in Sports Illustrated (a well known sports weekly of nationwide circulation) dealing with the same general subject of the discontent of black athletes in sports. The Sports Illustrated series was researched in depth; it contained quotations from many sources, supported by taped interviews, including quoted interviews with some of the black athletes involved, the plaintiff himself, and the officials of the university at which he was employed, The University of Texas at El Paso. The Sports Illustrated articles comported to the previously published accounts of the same events and conflicted directly with the portion of "The Angry Black Athlete" complained of by plaintiff.

In addition to the Newsweek article being in direct conflict with reporting of the same facts by the Sports Illustrated series in July and by all other news media at the time that the events originally occurred in February, 1968, the article was also directly contrary to the account of plaintiff's relationship to his athletes which Newsweek's sports editor had caused to be pub-

lished in a Sports Illustrated article in its issue of February 26, 1968. By his own admission the parts of both the February, 1968 Sports Illustrated article and the July 15, 1968 Newsweek article relating to the plaintiff were written by Pete Axthelm, a former staff writer for Sports Illustrated and Newsweek's sports editor at the time of the publication of the libelous article concerning plaintiff. No research, other than Axthelm's, was made on the libelous phase of the article; no objection was raised in the editorial processing of the article; and the sole responsibility was that of Axthelm. By Axthelm's own account he deliberately published an entirely different version in Newsweek from what was told to him by Coach Vandenburg in February, 1968 and from what Axthelm caused to be published in Sports Illustrated on February 26, 1968. Axthelm made a conscious effort to make the Newsweek article "different and to make it mine"; and he made a conscious decision to write the libelous portion of the Newsweek article contrary to the facts obtained from his personal interview with plaintiff in February, 1968 and contrary to the account he published in Sports Illustrated in February 1968. Axthelm expected some three million readers of Newsweek magazine to read the statements; and he knew that the Newsweek version of the facts would have an adverse effect with black athletes.

Axthelm wrote about events involving track athletes from The University of Texas at El Paso and their relationship to their coach, Wayne Vandenburg, the plaintiff. He clearly knew the distinction between an invitational track meet of the type promoted by the

New York Athletic Club in February, 1968 involving individual athletes and of regularly scheduled university track meets in which teams representing that university compete against other teams representing competing schools. Participation by black athletes from the University of Texas at El Paso in a meet in New York City in February, 1968 to which only certain outstanding athletes from the team, rather than the entire team itself, were invited to participate was initially reported by Axthelm (in Sports Illustrated) as being an individual decision of each athlete, based on his personal choice, and without coercion from the coach. The meet was the subject of a boycott by black power advocates. Axthelm knew that Coach Vandenburg was a well known figure on the track circuit; the most colorful and out-spoken coach to come into track and field in a long time and who had done a sensational job of building up a team in a very short time; a coach who was "good copy" and one of the first people you want to get to know in order to "get the dope" because he always was around and one of the most popular of the people around the track meets; a person who "stood out". Axthelm spoke to two of the black athletes from the University of Texas at El Paso who participated in the New York Athletic Club Invitational Track Meet in February, 1968 and gleaned sufficient information from them to publish in his Sports Illustrated story that Bob Beamon (one of the athletes who competed) was obviously nervous and admitted he had come mainly for the free trip to his family in New York — and also published Beamon's picture showing him as "one of the few Negroes who competed in the NYAC Meet" and who "said he want-

ed the trip home to New York". Axthelm testified that there was nothing about Coach Vandenburg's demeanor or the way that he said what he did during the interview in February, 1968 which would lead Axthelm to suspect or disbelieve Vandenburg at that time. Axthelm also interviewed a couple of other black athletes who ignored the NYAC boycott and actually quoted one (Lenox Miller) in his Sports Illustrated story as stating "that he didn't want to be dictated to by outsiders" and that "it was an insult to be threatened by people who weren't even athletes". Miller's published position was that it was an individual decision up to each athlete as to whether or not to participate. After publishing these facts in the February 26, 1968 issue of Sports Illustrated Axthelm never made any further investigation into the facts surrounding the participation of athletes from The University of Texas at El Paso in the New York Athletic Club Invitational Track Meet except to talk to certain "outside sources". He never again spoke to any of the athletes involved; he never contacted any official from the University of Texas at El Paso; no contact was had with officials of The New York Athletic Club concerning the events transpiring at the invitational track meet which it sponsored; and the only contact by Axthelm with anyone described in the libelous portion of his article was Axthelm's shocking and never explained exclamation to the plaintiff during a chance meeting at a track meet only a few days prior to the writing of the libelous article to the effect that "you're in a lot of trouble aren't you".

Prior to his conscious and deliberate publication of a contrary version of the facts in Newsweek, Axthelm submitted queries to Newsweek Bureaus throughout the country asking not for facts but for "impressions and interpretations" and asking the Bureaus to "get beyond reporting". Axthelm received many replies, but none concerned the University of Texas at El Paso except for three responses filed by Dale L. Walker (Stipulation As To Items Being An Official Part of the Record). This was the only direct information received by Axthelm prior to consciously publishing his contrary story about Coach Vandenburg, and it was completely void as to any coercion by the plaintiff causing participation in the New York Athletic Club Invitational Track Meet; it made no mention whatsoever of any meeting of the black athletes who participated in the New York Invitational Meet with Harry Edwards (an Axthelm "source"); it mentioned a suspension (but not a "prompt dropping") of a separate group of black athletes who subsequently boycotted a regularly scheduled meet with Brigham Young University and stated that their scholarships would not be renewed *after* the end of the school term; and it elaborated on the extreme pressure and threats against UTEP athletes *following* participation in the New York Invitational Meet. This direct information was entirely contrary to the manner in which Axthelm reported these facts in his Newsweek article.

Axthelm himself acknowledged that his libelous story about the plaintiff has a

"Vague, general phrase — really, unfortunately, as you pointed out, should have been checked and, you know, made more specific" . . . "that is a, is a, is a vague, that's a vague phrase which is technically inaccurate. . . ." Axthelm 313-314);

Axthelm's "sources" are equally vague and technically inaccurate. One, Anita Verschoth, admitted that:

"The first part of this (referring to Newsweek's libelous article) where it says 'Vandenburg threatened to kick six athletes off the team if they joined the boycott of the New York Athletic Club,' I don't know at all. I never asked anybody whether that was true. . . ." (Verschoth 581).

Another, Sam Skinner, told Axthelm:

"We had even heard *rumors for the fact, but no proof of it* . . . You *know, you don't go with rumors;* you only go with facts. You prefer by word of mouth by others, really." (Skinner 414)

". . . this was the *rumor* that we had gotten. But, as I said, *we had no facts* because, not to my knowledge had anyone talked to the two brothers from the Bahamas concerning the situation . . . but this was our understanding, that *this was a rumor to the fact* . . ." (Skinner 516) (Emphasis ours)

In answer to a direct question as to why he and other black UTEP athletes competed at the New York Athletic Club Invitational Track Meet Skinner, as a "source", quoted to Axthelm that Bob Beamon (a competing athlete) responded with:

> "'What do you think, brother?' with that smile on his face, you know, which is kind of like a code a brother know and, another brother seeing, he *don't* have to come out and say: 'Yeah, man; that's what happened.' *It was just understood.*" (Skinner 514) (Emphasis ours)

This furnishes the "clear and convincing" evidence upon which Newsweek relies in support of its publication of libelous statements contrary to previously known and previously published facts. No spoken words — no positive statements — an unequivocal "what do you think" plus the application of a secret code between two, unrelated, people. A further source is Harry Edwards. This source had made an investigation into the facts "for his own *political* purposes"; he felt the New York Athletic Club was racist and exploited black athletes; that the University of Texas at El Paso was not justified in suspending black athletes who refused to participate in a *regularly scheduled* university track meet despite the fact that such athletes well knew they would lose their scholarships if they boycotted such a regularly scheduled meet; he recognized a clear distinction between an invitational and a regularly scheduled university track meet; he felt that the Universiy of Texas at El Paso was racist; that Wayne Vandenburg, the plaintiff, was irresponsible; and that Vandenburg

had a reputation for unfairness. This source acknowledged being paid over $9,000 for making talks and appearances before groups interested in hearing his "Black Power" philosophy; that he had received income from two books published by him on this subject; and he expected to publish magazine articles and a third book in the future relating to his philosophy and position as a leader in the "Black Power" movement. This source acknowledged having seen black athletes on television declaring their reasons for participation in the New York Athletic Club Invitational Track Meet, despite the black power boycott, were "to see friends and visit relatives". This same source refuted Newsweek's published statement that he had talked to black athletes from UTEP prior to their having boycotted a regularly scheduled track meet with Brigham Young University in April, 1968 by saying:

> "The quotation is inaccurate only to the extent that one could interpret that quotation as meaning I talked directly to the track athletes . . . I made it clear to Pete Axthelm that at the meeting of April 1968 the athletes were *not* present." (Emphasis ours)

Yet, Axthelm's article reported that Edward's meeting with the athletes resulted in their subsequent boycotting. With respect to other reporting by Axthelm that "Edwards would not leave them alone. He openly threatened them with retaliation by 'people back in their home towns' and injected a spontaneous protest with an unnecessary atmosphere of violence" this source stated:

> "I could not vouch for that. At any rate, that is someone's interpretation of what went on, and I have no opinion on it."

With respect to other facts reported by Axthelm concerning Edwards in another Newsweek article this same source stated:

> "This I do not recall, and not only that, but I object to the phrasing of the question, because as far as I am concerned it involves a point of conjecture and a point of conjecture which I, myself, do not agree with . . . the statement which was read is invalid . . ."

In *Goldwater vs. Ginsburg*, 414 F. 2d 324, (2d Cir. 1969), cert. denied 90 S. Ct. 701, the Court refuted the defense of reliance upon "sources" for publishing false statements by saying at page 837:

> "Citation of sources for most of the statements about Senator Goldwater in Part I of the 'Goldwater issue' and the accurate reprinting in Part I of most of the original responses of psychiatrists to the Fact questionnaire, does not, as appellants appear to claim, insulate appellants from responsibility for any of the false statements they made. Reliance upon newspaper articles, books, and campaign literature, and upon accurate reprinting of another's letter are only factors which, with other factors, are probative of whether the publisher of the cumulated material was motivated by actual

> malice when he caused the full material to be published. Repetition of another's words does not release one of responsibility if the repeater knows that the words are false or inherently improbable, or there are obvious reasons to doubt the veracity of the person quoted or the accuracy of his reports. *St. Amant v. Thompson, supra* at 732, 88 S.Ct. 1323."

In *Ginsburg vs. Goldwater, supra,* the Court also discusses another point highly pertinent to the instant case when it says:

> "Furthermore, in our case, Ginsburg added certain innuendoes to some quoted statements and quoted other statements out of context in order to support his predetermined result. One cannot fairly argue his good faith or avoid liability by claiming that he is relying on the reports of another *if the latter's statements or observations are altered or taken out of context."* (Emphasis ours)

The record reflects that the Newsweek story quoted a Southwestern track coach who "inflamed the racial issue" by a get-tough policy, whereas in actuality no such coach ever existed. Axthelm alleged that the quote was taken from information contained in a Newsweek Bureau file, but the file referred to completely lacks any such quote from anyone and has no support in the records of Newsweek. The earlier proofs of the Axthelm article show how Axthelm "got beyond reporting" and added his own "impressions and interpretations" by

changing his story from merely reporting a get-tough policy by certain school officials into a fictitious quotation from an unnamed coach. As pointed out in *Goldwater vs. Ginsburg, supra,* a Motion for Summary Judgment was held to have been properly denied, at page 335:

> "The Goldwater issue, appellants contend, even if it contained falsehoods, was protected speech under the First Amendment, and the interpretive New York Times and related decisions dictate that the court below should have granted appellants' motion for summary judgment. We do not agree. False statements are protected only if they are honestly made. *New-York Times Co. v. Sullivan, supra* at 278.
>
> "The use of calculated falsehood, however, would put a different cast on the constitutional question . . . For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality . . .' *Chaplinsky v. New Hampshire,* 315 U.S. 568, 573, 86 L.ed. 1031, 1035, 62 S.Ct. 766. Hence the knowingly false statement and the false statement made with reck-

less disregard of the truth, do not enjoy constitutional protection. *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

"If appellee's response to appellants' motion 'set forth specific facts showing that there ... (was) ... a genuine issue for trial,' here the crucial issue of whether actual malice motivated the publication, then the court below properly denied the motion. Fed. R. Civ. P. 56 (e)."

The Court further stated at page 342:

"There is no doubt that evidence of negligence, of motive, and of intent may be adduced for the purpose of establishing, by accumulation and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity. See e.g., *Curtis Publishing Co. vs. Butts*, 388 U.S. 130 (1967)."

The burden of showing the non-existence of a genuine issue of fact rests on the moving party, Newsweek, and "the inferences to be drawn from the underlying facts contained in (the material presented) must be viewed in the light most favorable to the party opposing the motion" in accordance with Rule 56 (c), Fed. R. Civ. P. *United States vs. Diebold, Inc.*, 1962, 369 U.S. 654, 655; *Gauck vs. Meleski*, 5 Cir. 1965, 346 F.2d 433, 436.

CONCLUSION

As stated in *New York Times Co. vs. Connor*, 5 Cir. 1966, 365 F. 2d 567 judgment favorable to a publisher is proper where:

> "There is no evidence that any of the sources have *denied* giving the questioned information" or that a source "*twisted or misstated* the information given him or ... knew or *had clear grounds to suspect that the statements might be false* ... or where there is no evidence that he *misquoted his sources* or gave information acquired from them a *different slant than intended* ..." (emphasis ours)

By comparison this record reveals that Axthelm's source (Edwards) denied giving him certain information; that Axthelm twisted or misstated certain information given him by a source; that he "slanted" his article heavily against the plaintiff; and that he knew or had clear grounds to suspect that his published information was false. Axthelm actually misquoted his sources; he climaxed a conscious intent to make the Newsweek story different by concocting a quote that by innuendo could be no one other than the plaintiff; and he then published it as proof of the plaintiff's inflammation of the racial issue through a get-tough policy. These actions bring the instant case squarely in line with the actions of the defendant involving the issue of actual malice in *Goldwater vs. Ginsburg*, 414 F. 2d 324, and in which certiorari was denied in 90 S.Ct. 701. The totality of the defendant's conduct as reflect-

ed by the multitudinous facts contained in the record fully support the findings of both the District Court and the Court of Appeals that Newsweek has failed to show that there is no genuine issue as to any material fact. In *Time, Inc. vs. Ragano,* 5 Cir. 1970, 427 F. 2d 219, knowledge that the plaintiff was an attorney created a genuine issue of material fact as to whether Time's reference to the plaintiff as a top Cosa Nostra hoodlum was made in good faith or with malice and, therefore, summary judgment was held to have been properly denied. In a companion case, *Wasserman vs. Time Inc.,* D.C. Cir. 1970, 424 F 2d 920, cert. denied 90 S.Ct. 1844, a summary judgment granted by the Trial Court was reversed by the Court of Appeals and remanded for trial on the issues of actual malice, defamation, and possible damages. In *Kerns vs. McWilliams,* 5 Cir. 1971, 435 F. 2d 1307 an order allowing an interlocutory appeal from a District Court denial of a Motion for Summary Judgment was found to have been improvidently granted, and the cause was remanded for trial on the issues of actual malice, defamation, and possible damages in accordance with the standards of *New York Times Co. vs. Sullivan,* 1964, 376 U.S. 254.

In view of the thorough and careful review of the record in this case by both the Trial Court and by the Court of Appeals there appears to be ample support for the holding that this cause should be remanded to the District Court for trial on the issue of actual malice. It is, therefore, respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Francis C. Broaddus Jr.
525 Southwest National Bank Bldg.
El Paso, Texas 79901

Bert Williams
707 Southwest National Bank Bldg.
El Paso, Texas 79901

George A. McAlmon Jr.
508 Southwest National Bank Bldg.
El Paso, Texas 79901

Attorneys for Respondent,
Wayne Vandenburg

AFFIDAVIT OF SERVICE

State of Texas)
County of El Paso)

Francis C. Broadus Jr., being duly sworn, deposes and says that he served the foregoing Brief in Opposition to Granting Petition for Writ of Certiorari upon the attorneys for petitioner herein on June ____ 1971 by mailing three true and correct copies thereof, airmail postage prepaid to Leo P. Larkin Jr., Attorney for Petitioner, 200 Park Avenue, New York, New York, 10017, and postage prepaid to Schuyler B. Marshall, Attorney for Petitioner, 11th Floor, El Paso National Bank Building, El Paso, Texas, 79901.

Francis C. Broaddus Jr.

Sworn to before me this
____ day of June, 1971.

Notary Public

FILED
AUG 2 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1970

No. ~~1672~~ 70-144

NEWSWEEK, INC.,

Petitioner,

—against—

WAYNE VANDENBURG,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

SCHUYLER B. MARSHALL
RICHARD MUNZINGER
Eleventh Floor
El Paso National Bank Building
El Paso, Texas 79901

LEO P. LARKIN, JR.
STANLEY GODOFSKY
STEPHEN FROLING
200 Park Avenue
New York, New York 10017

Attorneys for Petitioner, Newsweek, Inc.

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PRELIMINARY OBSERVATION

As noted at page 8 of our Petition for a Writ of Certiorari, although Vandenburg persistently denied, in his sworn testimony and briefs below, that he had "promptly dropped champion Bob Beamon and five others from the squad" after the Brigham Young Meet, this aspect of Vandenburg's claim was reluctantly abandoned during oral argument in the Fifth Circuit. It is not reasserted here.

The fact that Vandenburg (as he now concedes) did in April, 1968, precisely what Newsweek said he threatened to do in February of that year was but one persuasive reason, among many, why Axthelm ultimately became con-

vinced that Vandenburg had lied to him in February, 1968, when Vandenburg denied that he had threatened to dismiss from the UTEP team any athlete who boycotted the NYAC Meet.

We refer at the outset to Vandenburg's abandoned claim, not only because of its obvious relevance to the issue of "actual malice" (as well as truth and damages), but because it casts a cloud on the credibility of Vandenburg's entire presentation—a cloud which Vandenburg's Brief in Opposition scarcely serves to dispel: The brief is flagrantly misleading. Facts are misstated. Testimony is contorted and quoted out of context. "Evidence" has even been fabricated.

There follow a number of examples, by no means exhaustive, of how Respondent has attempted to deceive this Court as to the Record below.*

DISCUSSION

I

As Vandenburg quotes Harry Edwards (Br., top of p. 12), one would believe that Edwards could not "vouch" for the accuracy of a portion of "The Angry Black Athlete." In fact, the quoted testimony related to an entirely different article Axthelm had earlier written for *Sports Illustrated;* and it was not directed to the truth of what was published, but was simply his response to the following question:

> "Is the following a correct quotation from the aforesaid article written by Pete Axthelm in

*Because Respondent has so abused that Record, we have caused a copy, certified by the Fifth Circuit Clerk, to be filed with the Court. References preceded by "Record" are to its pages. References to pages of Vandenburg's brief are preceded by "Br."

Sports Illustrated . . . or, if not, then explain in detail". (Record, p. 437)

II

Vandenburg's reference (Br., p. 12) to Edward's comment on a Newsweek article published long after "The Angry Black Athlete" (and which is therefore scarcely probative of the issue of "actual malice") is similarly misleading. Vandenburg implies inaccurately that Edwards' criticism was directed to Axthelm's reportorial ability when, in fact, he was objecting to the phraseology and conjecture implicit in the question propounded to him. Moreover, as the unedited text makes clear, Edwards' testimony has been so rearranged and "edited" as to distort its import: The testimony actually reads (Record, pp. 497-500):*

"Q260. Have you ever called Pete Axthelm, Sports Editor of *Newsweek* Magazine, and give him information which he thereafter published in Newsweek Magazine?

A. It's quite possible that I have.

* * *

Q261. If your answer to the preceding cross-interrogatory is in the affirmative, state whether or not you furnished him information concerning your contact with angry Mexican students who were absorbed in secret plans for demonstrations and possible riots that could disrupt and even destroy the Olympics.

*Those portions of the testimony "quoted" by Vandenburg have, for the Court's convenience, been underscored here and throughout this Reply Brief whenever the unedited, full text of such testimony is set forth.

A. This I do not recall, and not only that, but I object to the phrasing of the question, because as far as I'm concerned it involves a point of conjecture and a point of conjecture which I, myself, do not agree with.

Q262. If your answer to the next preceding cross-interrogatory is in the affirmative, state whether or not the following is a true and correct quotation from *Newsweek* Magazine from an article headed "Sports—Plot to Kill the Olympics":

> "The new threat to the Olympics was revealed last week, reports Newsweek Sports Editor Pete Axthelm, when students claiming to be leaders of CAOS (Comite Anti-Olimpico de Subversion) visited Harry Edwards, leader of the Black Athletes' Movement in the United States, in San Jose, California. 'We have the support of at least 100,000 young people,' they told Edwards. 'We are prepared to lose some lives in an initial charge on the stadium—but we will stop the Olympics, by any means necessary.'
>
> "Edwards did not say what role, if any, American Black athletes might take in such an effort, but he did fire off a requested letter of support . . ."

A. The statement which was read is invalid in the sense that the students did not communicate with me that they would stop the Olympics. They communicated with me they were going to use the Olympics as a stage area within which to dramatize the plight of the masses of impoverished Mexicans in Mexico, and also to protest the relationship of the Mexican government to the military of the United States. In this regard I supported the protest of the

students. At no time was it communicated to me that it was their intention to stop the Olympic Games. It was their intention to use the Olympic Games as a stage upon which to dramatize the plight of their people, and as far as I was concerned, I could not very well engage in this endeavor myself and then deny other people who considered themselves to be oppressed that same opportunity. So, I did support these students. Whether I gave this information to Pete Axthelm personally, over the phone or through letter—I know I didn't write a letter—I could not say. Pete Axthelm could have picked this up in the press, because I did hold a press conference in Chicago in August of 1968 at which time I made the statement that we were supporting the students who were demonstrating in Mexico and protesting the expenditure of $150,000,000.00 on what they considered to be an event which did not address itself to the needs of the impoverished Mexican people. I may have communicated this directly to Pete Axthelm, either over the telephone or in person, but I am not sure. But I can honestly state that at no time did the students, the Mexican students with whom I had contact tell me that it was their intention to stop the Games. However, I do not deny that one of the repercussions of their activities could have been the stopping or at least the suspension of the regular schedule of events during the course of the Olympic Games."

III

In an article written for *Sports Illustrated,* in February, 1968, Axthelm reported without comment the following statement by Vandenburg (Record, p. 618):

> "I asked each one [of the UTEP black athletes] if he wanted to come," said Coach Wayne Vandenburg, "and each one said yes. There was no pressure. I told them again tonight that they could back out and I'd never hold it against them."

Vandenburg claims (Br. p. 4) that the alleged libelous statements were contrary, not only to the foregoing report, but "to every *earlier* published account on the subject" (emphasis supplied).

Newsweek has never denied, of course, that, at the time of the NYAC Meet, Axthelm—and other reporters—published Vandenburg's denial that he had pressured his players to participate. But this fact can scarcely be probative of Axthelm's "actual malice" five months later, after Vandenburg had actually thrown his black players off the UTEP team and when, according to the uncontradicted testimony in the Record, Axthelm was in possession of additional, consistent information from several sources he considered reliable which supported his conclusion that Vandenburg had lied.

Additionally, Vandenburg never established that Axthelm had ever seen any of the February, 1968 articles to which he now refers and the articles themselves are not in the Record. But even if Axthelm had seen those articles, this fact would be irrelevent to the issue here, since it would only show that, in February, 1968, publications in addition to *Sports Illustrated* considered Vandenburg's public denial worth printing.

The constitutional guarantees of free speech and press cannot be suspended simply because other media, in different circumstances and at an earlier time, published reports inconsistent with the Newsweek story; the applicability of the First Amendment obviously does not depend on press unanimity.

IV

In a patent attempt to bring this case within *Goldwater v. Ginsburg*, 414 F. 2d 324 (2d Cir. 1969), *cert. denied*, 396 U. S. 1049, *reh. denied*, 397 U. S. 978, Vandenburg implies (Br. p. 5) that Axthelm's objective to make "The Angry Black Athlete" . . . "different and to make it mine" was tantamount to a conscious effort to make it false.

Axthelm's actual testimony, which puts the lie to this unwarranted implication, was as follows (Record, p. 262-63):

> "Q. Well, there's a close parallel between his [Jack Olson's] series of articles [for "Sports Illustrated"] and your Newsweek article, is there not?
>
> A. Well, obviously the subject is the same. We made a very, and I think made a very conscious effort to focus in on, on, this was another part of our thinking on the San Jose scene, was, because we wanted ours—we didn't want ours to be like a one-issue condensation of what he was going to do in five. In other words, we weren't interested in trying to hit every area and we decided to steer ours in one direction and hope that that would make it considerable different than his—we didn't want to —we didn't want to make it look like a repetition of anything——
>
> Q. How did you know what Jack Olson's series of articles was going to be?
>
> A. Well, if you——
>
> Q. You know of the article and knew it was five articles and you knew what it generalized, how did you know that?
>
> A. Well, I was at Sports Illustrated when the idea was originated. John Rodgers was there even

> later while it was being done, he did some work on it with Jack, and I was, frankly, very conscious of not, I didn't want to be put in the position at all of having the Sports Illustrated editor say that I had taken anything, you know, used things that were gotten at their expense and through their stringers and everything, so I remember of using nothing that came into the office while I was still there. I purposely, as a matter of fact, skipped certain areas that I felt might, I had a rough idea, of key themes of Jack's piece, and purposely stayed away from that, and as I said I was making a very conscious effort to make it a different story, to make it mine.

V

Vandenburg claims (Br. p. 13), with absolutely no foundation in the Record, that the quotation in "The Angry Black Athlete" attributed to a Southwestern track coach was fictitious, and was therefore evidence of Axthelm's "actual malice" toward Vandenburg. This charge is inexcusable in the light of Axthelm's uncontradicted testimony that the quotation was contained in a dispatch from Newsweek's Los Angeles Bureau as an anonymous quotation, a common journalistic practice, and that it was from another track coach, not Vandenburg (Record, pp. 320-22).

Vandenburg apparently bases his charge of "fictionalization" on the claim (stated as if it were established fact) that the Newsweek file or "packet" of supporting bureau dispatches, documents, articles and other data on which the article was based does not contain the Los Angeles dispatch described by Axthelm.

This claim is utterly unjustified. The packet, which was made available to Vandenburg's counsel, was thereafter misplaced and neither party knows its contents or is

able to account for its loss. The parties in fact entered into a written stipulation dated July 21, 1970, *acknowledging that they did not know what the packet contained.* That stipulation, completely ignored by Vandenburg, reads in relevant part:

> "The Newsweek 'packet' . . . identified in the deposition of Peter Axthelm as the envelope in which the Defendant kept data pertaining to the article 'The Angry Black Athlete' . . . has been lost or misplaced by counsel and its whereabouts are [sic], at the present time, unknown to the parties . . . [T]he parties do not know whether the 'packet' attached hereto is full and complete and whether it contains all of the matters on which the article in question was based . . . [N]one of the exhibits attached to Plaintiff's Controverting Affidavit in Opposition To Defendant's Motion for Summary Judgment were in the Newsweek 'packet', although Axthelm's authorship of the *Sports Illustrated* story marked Exhibit A to said affidavit is not denied or questioned."

VI

The only article published contemporaneously with "The Angry Black Athlete" which Vandenburg claims (Br. p. 4) is contrary to the Newsweek article is one of the *Sports Illustrated* articles by Jack Olsen, published July 15, 1968, which merely republished Vandenburg's February, 1968, statement that he had put no pressure on his athletes at the time of the NYAC Meet.

Vandenburg claims that publication of the Olsen article by *Sports Illustrated* is somehow evidence of Newsweek's "actual malice," conveniently overlooking Axthelm's uncontroverted testimony (Record, pp. 244-47, 259-64) that he never saw that article; that he was unaware of its con-

tent at and before publication of "The Angry Black Athlete"; and that there had been no contemporaneous contact, collaboration or sharing of information between him and Olsen. Vandenburg concedes that the *Sports Illustrated* article was published "simultaneously" with the Newsweek article. Obviously, then, Axthelm could not have seen the *Sports Illustrated* article before his own article was published.

VII

Newsweek has freely conceded from the outset of this litigation that its article contained two minor, non-libelous, insignificant errors of fact:

1. Since only five of the six UTEP athletes who ran at the NYAC Meet boycotted the Brigham Young Meet, its reference to "the same athletes" being dropped, although substantially true, was technically inaccurate.

2. Although Harry Edwards had talked personally with many of the UTEP athletes while he was at El Paso, he did not talk with the black members of the track team, who happened to be away from El Paso at the time.

These minor errors are the springboard from which Vandenburg has deliberately distorted testimony in a patent effort to demonstrate a preexisting (although unexplained) intention on Axthelm's part to harm Vandenburg through falsehood. As to the second of such errors, for example, Edwards' *full* testimony is not as Vandenburg would have it. (Br. p. 11), but as follows (Record, pp. 457-459, 465):

> "I did not talk directly to the track athletes. I talked to other athletes at the school, and what this was, it was an open discussion, an honest discussion between Blacks. One reason why the meeting was

closed to Whites, we have found when Whites are in the room, Blacks have a tendency not to be as honest as it is probably necessary for them to be under situations such as we were dealing with there, and it became quite clear to me that, in fact, Vandenburg had intimidated the Black athletes involved. Now, as I stated before, the quotation is inaccurate only to the extent that one could interpret that quotation as meaning I talked directly to the track athletes. I talked to athletes at the University of Texas at El Paso. I talked briefly to them and perhaps some of them still at the University talked to the track athletes after I had gone or some of the athletes there talked to the Black track athletes after I had gone, but I did not talk to them directly. So my investigation, which as I stated was one of the main reasons I accepted a speaking engagement at the University of Texas at El Paso consisted of talking to athletes who were actually participating at that University, and the track athletes were not there, but the other athletes corroborated the fact that Vandenburg had intimidated the athletes and that it was, in fact, a policy of the Athletic Department that if a Black athlete boycotts—as with the New York Athletic Club thing, that any athlete who boycotts a meet, a regularly-scheduled event, would be no longer—considered no longer on the team, and this was also something that we had heard when we called the University of Texas at El Paso during the—just before the game between San Jose State and the University of Texas at El Paso was to be played, and we had talked to a couple of people who were on the campus at that time, and we were trying to figure out how we

could bring pressure on San Jose State to correct the injustices that Black people were suffering on that campus and in that community, and we had asked a couple of individuals on the campus there, via the telephone through some contacts that we had, would the Black athletes from the University of Texas at El Paso play if the Black athletes at San Jose State boycotted the football game, and we were told if they did not play, they would lose their scholarships, and this was as early as September 1967, before the New York Athletic Club thing ever came up, and this was one of the things that drove the Black students at San Jose State to formulate a policy to disrupt the game in order to bring about pressure to correct or at least get a commitment to correct the injustices that all Black people were suffering at San Jose and on that campus. So, as early as September, really, of 1967, we had gotten word that Black athletes would lose their scholarships if they boycotted any games or any regularly-scheduled athletic events.

* * *

"I made it clear to Pete Axthelm that at the meeting of April, 1968, the athletes were not present but that I had corroborated the reports that I and members of my staff had got in April of 1968 in particular, as well as during other periods of time, with one athlete from the University of Texas at El Paso who stated that the reports were correct, and who also stated that they had, in fact, as a result of the Brigham Young boycott, lost their athletic grants-in-aid; that they had been taken away from them. This is what I made clear to Pete

> Axthelm. I believed the assertions to be true; that the people—athletes in Modesto had corroborated it to me and that members of my staff had had many assertions corroborated with Black students at the University of Texas at El Paso and also other Black athletes from there."

Vandenburg would also have this Court believe (Br. pp. 8-9) that Axthelm admitted that his entire article was "vague" and should have been more carefully researched. But the carefully "edited" testimony Vandenburg quotes refers, not to the entire article or Newsweek's conduct, but only to Axthelm's candid admission of the error respecting "the same athletes" (Record, pp. 312-14).

Another example of Vandenburg's "loose" use of the testimony is his suggestion (Br. p. 9) that Anita Verschoth was a "vague and technically inaccurate" source because she admitted she knew nothing about the rumored threats at the NYAC Meet. Newsweek, however, never cited Miss Verschoth as a source for this particular aspect of its article, but only with respect to the statement regarding Vandenburg's actions at Brigham Young (Record, pp. 577-81) —a statement which Miss Verschoth supported without equivocation.

Despite Vandenburg's shaded and clipped recitation of Skinner's testimony (Br. pp. 9-10), it is inescapable that Skinner told Axthelm that the athletes had been required to compete at New York. (Record pp. 521-522). Additionally, in answer to Vandenburg's Cross-Interrogatory No. 12, Skinner related what he in fact told Axthelm concerning the aftermath of the Brigham Young boycott:

> "The best I can remember is that I said to Pete, relative to that situation was, you know, 'I talked to Bob Beamon the night before and the brothers had

indicated and said that the man had kicked him off the squad'.

"And Axthelm, I think, was saying to me something like: What are you talking about 'the man'?

"And I said, 'Coach Wayne Vandenburg'. And that was basically the way I communicated it to him.

"And, you know, we went into many things about that, many things about other things relating to information concerning black athletes. We kind of jumped, hit here and there, you know, on the conversation. Like all our conversations were like that, you know. I gave him, first of all, things that he required, and then other things I'd gathered." (Record p. 526).

Again, Vandenburg (purporting to quote the testimony of Skinner) seeks to persuade this Court that Skinner told Axthelm his information was based on rumors only. Thus, Vandenburg (Br. p. 9) quotes Skinner as follows:

> "We had even heard *rumors for the fact, but no proof of it . . . You know, you don't go with rumors;* you only go with facts. You prefer by word of mouth by others, really. (Skinner 514)" (Emphasis supplied by Vandenburg)

This testimony, however, pertained to rumors that Vandenburg had threatened two of his athletes from the Bahamas with loss of their passports if they did not compete at Brigham Young. Thus, the testimony, without misrepresentation, was actually as follows (514-15):

> ". . . We had even heard rumors for the fact, but no proof of it, but that two brothers of the Bahamas that ran in the BYU meet when they attended Texas—El Paso, they ran and we had

> no facts and nobody, to my knowledge, talked to the two brothers if this was true, but this was one of the rumors that was around. You know, you don't go with rumors; you only go with facts. You prefer by word of mouth by others, really."

Significantly, the Newsweek article contains no reference to these rumors and thus, if the Skinner testimony quoted in Vandenburg's brief has any significance at all in the context of this case, it means either (a) that Skinner was not prepared to pass onto Axthelm rumors, the veracity of which he could not establish, or (b) that Axthelm was not prepared to publish such rumors. How such evidence could possibly support a claim of "actual malice" is beyond our understanding.

In summary, although Vandenburg has attempted to deceive this Court into the belief that Axthelm's sources failed to provide him with information justifying the statements concerning Vandenburg, his assertions—and his deliberately distorted version of the testimony—do not bear scrutiny. This Court need only read the unedited testimony of the witnesses Edwards, Verschoth and Skinner, set forth in Appendix F to our Petition, to find that Axthelm's sources for the statements here involved were direct, several and consistent.

VIII

Vandenburg does not dispute that the doctrine of *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964), is applicable here. Instead, he relies exclusively on the claim that the Record facts establish "actual malice" within the framework of *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130 (1967), and *Goldwater* v. *Ginzburg,* 414 F. 2d 324

(2d Cir. 1969), *cert. denied*, 396 U. S. 1049, *reh. denied*, 397 U. S. 978. But the distinctions in both cases are obvious and in each instance controlling: Curtis relied on a single source who was known by it to have been involved in a recent criminal matter, and whose veracity was obviously dubious. With respect to the February, 1968, incident, *Newsweek's* article is based on consistent information provided by a number of separate, independent sources, each of whom was so situated as to encourage and warrant Axthelm's confidence, as well as Vandenburg's own belatedly conceded actions at Brigham Young.

Vandenburg has also criticized Axthelm for not contacting the UTEP athletes involved or members of the UTEP administration before writing his article. In answer, it need only be said that, at the time the article was written, Axthelm had ample material before him to support and justify what he wrote, and that *St. Amant* v. *Thompson*, 390 U. S. 727 (1968), *New York Times Company* v. *Connor*, 365 F. 2d 567 (5th Cir. 1966), and *Time, Inc.* v. *McLaney*, 406 F. 2d 565 (5th Cir. 1969), *cert. denied* 395 U. S. 922, among other authorities, have all held that one may rely on such reports where he does not act with "a high degree of awareness of their probable falsity."

Goldwater v. *Ginzburg, supra*, p. 15, is likewise completely inapposite. The opinion in *Goldwater* recites a parade of hard, direct facts which not only clearly inferred "actual malice", but which approached conclusive proof of the same. There can be no doubt that the defendant in the *Goldwater* case had embarked on a campaign to establish Goldwater's emotional and mental instability and his unfitness for the Presidency, regardless of the facts. There is no evidence of any such preconceived design and purpose here.

CONCLUSION

In our Petition for a Writ of Certiorari (p. 7 fn.), we challenged Vandenburg to cite any testimony in the Record which controverted the testimony set forth in Appendix F to the Petition or which otherwise established a triable issue with respect to "actual malice". As we have demonstrated, Vandenburg's only response to that challenge has been to distort the Record in an apparent and studied attempt to mislead this Court.

Despite his inexcusable shaping and shading of the Record, Vandenburg has failed to unearth even a scintilla of evidence of any design or intent, by Axthelm or by Newsweek, to malign his character by deliberate falsehood or with reckless disregard of the truth. To the contrary, the Record establishes beyond dispute that Axthelm believed in good faith—and had ample grounds for believing—that what he said about Vandenburg in the Newsweek article was entirely true. The Record reflects that, prior to publication, extensive investigation was conducted and that every material statement in the article was supported by information received from sources believed reliable and accurate—sources all consistent with one another. Summary judgment is therefore required in this case to avoid the harassment of protracted and expensive litigation, itself violative of the privileges secured by the First and Fourteenth Amendments.

We believe that, if the Fifth Circuit had not avoided its constitutionally prescribed duty to review the Record, this case would no longer be pending; but irrespective of the outcome of Newsweek's motion on the merits, the Fifth Circuit, by declining to review the Record, has, we submit, deprived Newsweek of its constitutional rights. As this

Court recently held in *Rosenbloom* v. *Metromedia, Inc.*, 39 U. S. L. W. 4694, 4702 (June 7, 1971):

> "Aside from these particularized considerations, we have repeatedly recognized that courts may not avoid an excursion into factfinding in this area simply because it is time consuming or difficult. We stated in *Pennekamp* v. *Florida*, 328 U. S. 331, 335 (1946), that:
>
> > 'The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they were made to see whether or not they . . . are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.' (Footnote omitted).
>
> Clearly, then, this Court has an "obligation to test challenged judgments against the guarantees of the First and Fourteenth Amendments," and in doing so "this Court cannot avoid making an independent constitutional judgment on the facts of the case." *Jacobellis* v. *Ohio*, 378 U. S. 184, 190 (1964). The simple fact is that First Amendment questions of "constitutional fact" compel this Court's *de novo* review. See *Edwards* v. *South Carolina*, 372 U. S. 229, 235 (1963); *Blackburn* v. *Alabama*, 361 U. S. 199, 205 n. 5 (1960)."

Certainly the obligation of this Court to undertake a *de novo* review of the record where First Amendment freedoms are at stake is equally an obligation imposed on the Fifth Circuit; and the length of a record relating in large part to issues other than "actual malice" cannot justify that Court's failure to discharge its constitutional obligation.

For all of the reasons assigned in our Petition for Certiorari and in this Reply Brief, we respectfully submit that our Petition should be granted.

Respectfully submitted,

SCHUYLER B. MARSHALL
RICHARD MUNZINGER
Eleventh Floor
El Paso National Bank Building
El Paso, Texas 79901

LEO P. LARKIN, JR.
STANLEY GODOFSKY
STEPHEN FROLING
200 Park Avenue
New York, New York 10017
Attorneys for Petitioner,
Newsweek, Inc.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

STEPHEN FROLING, being duly sworn, deposes and says that he served the foregoing Reply Brief upon the attorneys for respondent herein, on July 30, 1971 by mailing three true and correct copies thereof, airmail postage prepaid to Francis C. Broaddus, Jr., Esq., Attorney for Respondent, 525 Southwest Center, El Paso, Texas 79901, and to Burt Williams, Esq., Attorney for Respondent, 707 Southwest Center, El Paso, Texas 79901.

/s/ STEPHEN FROLING
Stephen Froling

Sworn to before me this
30th day of July, 1971.

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Notary Public